

Law Journal

17

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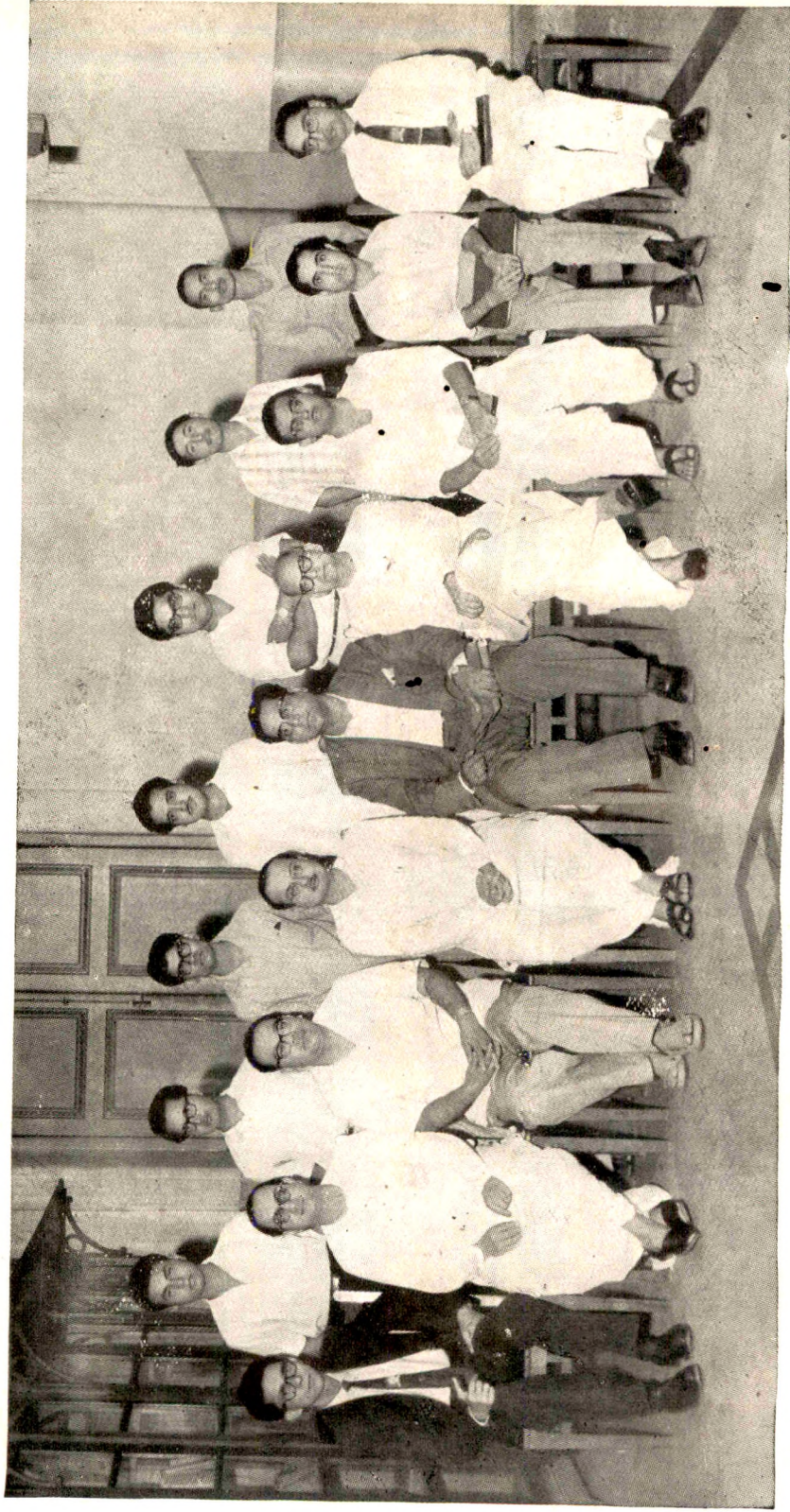


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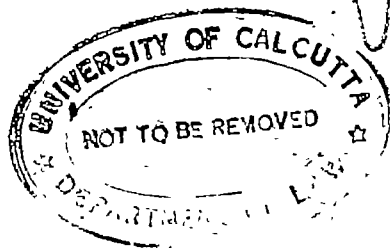
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LAW JOURNAL

UNIVERSITY COLLEGE OF LAW CALCUTTA.



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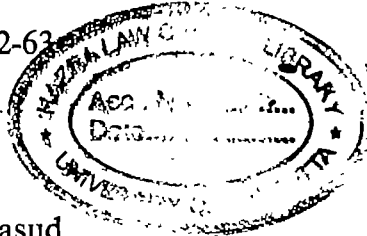
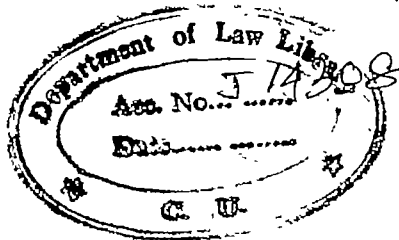
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LAW JOURNAL

UNIVERSITY COLLEGE OF LAW, CALCUTTA.

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March 18, 1963

Hon. Prabhakara Jha
Hon. Shyamal K. Chatterjee
Editors
University College of Law Journal
Calcutta, India

Dear Editors :

I had the extreme pleasure today to receive three copies of your University Law Journal which contains my article on the role of the Attorney General of the United States in maintaining the doctrine of separation of powers under the United States Constitution. In my opinion, your Journal printed this article in a manner which reflected greatest care and attention to detail, and both the editors and their assistants deserve commendation for the general excellence in presenting this material and the distinguished articles of other writers in this issue of the Journal.

In your editorial at p. XVII, I note the appeal for legal aid to unfortunate litigants who are victims of socio-economic conditions of your country. It may be of interest to you to know that both the President and the Attorney General are urging the Congress to enact a similar law which will provide for paid public defenders to represent indigent defendants in the federal courts of the United States.

Permit me also to add my congratulations to Miss Sadhana Sarkar who is described "as the only girl candidate who has passed the stiffest examination perhaps in the whole world ***." In the United States also, women are more and more assuming an important role in many professional fields, and particularly in the field of law. On our staff of about twenty attorneys, there are three women, all of them extremely competent, effective, and highly devoted to the affairs of the Government. There is indeed an important and comprehensive study presently under way pursuant to an executive order of the President establishing a Commission on the Status of Women in the United States. The purpose of this order is to appraise the progress made by women in various fields of endeavor, and the need for change.

Thus, as you can see, the people of India and the United States have many important ideals and aspirations in common which look to the continued orderly development of a rule of law and justice for all.

Sincerely
Nathan Siegal
Office of Legal Counsel

Department of Justice
Washington 25, D. C.

Oswaldo Illanes Benitez
Corte Suprema
Santiago-Chile

Santiago, December 3, 1962

The Editors
Srikanka Mukherjee
Paras Nath Singh
University College of Law Union
Calcutta-12

Dear Sirs :

I have the pleasure of sending you herewith attached the article entitled "Contemporary Law and Economic-Social Problems".

I have decided to send it translated into English in order to facilitate matters for you and because I realize the great preoccupation which today affects you, as well as all the people of India, as a result of the unjust aggression of which you are the victims from Red China.

I am with you with all my soul in this fight to which you are committed to drive off the daring invader.

I am an admirer of the people of India and its noble spirit for peace which it upholds as the best system of life between men.

Sincerely yours,
Sd/ Oswaldo Illanes Benitez

SPECIAL ASSISTANT
FOR PUBLIC INFORMATION

Department of Justice
Washington

October 26, 1962

Mr. Srikanta Mukherjee
Mr. Paras Nath Singh
University College of Law Union
Darbhanga Buildings
Calcutta, India

Gentlemen :

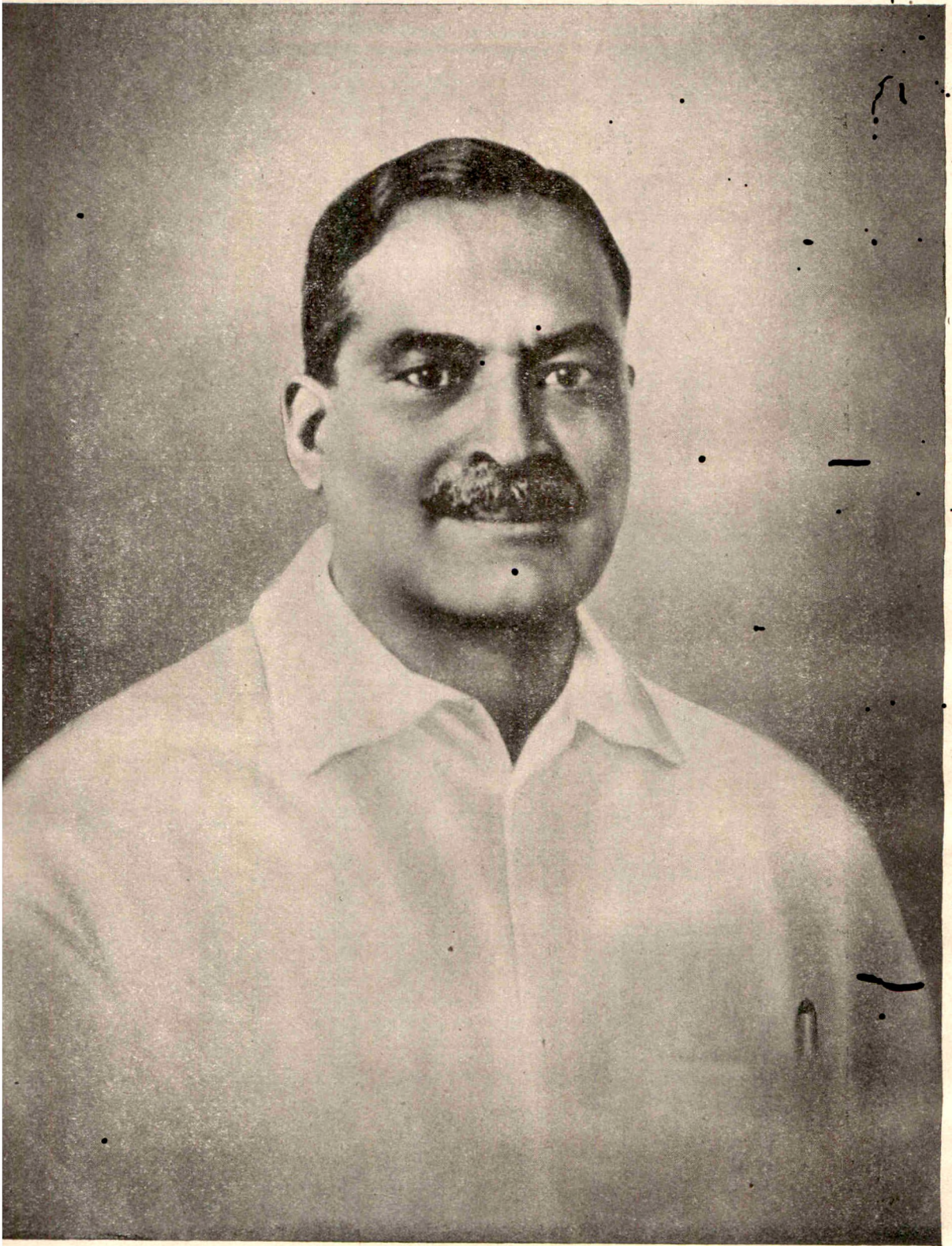
The Attorney General has asked me to thank you for inviting him to contribute an article to your law journal. He was pleased to receive your request and regrets he will not be able to do so at this time. Mr. Kennedy also asked me to extend his best wishes to both of you.

Sincerely,
Edwin O. Guthman
Special Assistant for Public Information

EOG/h



Dr. RAJENDRA PRASAD
The first President of India:
Died on 1st. March, 1963.



Dr. B. C. ROY
The Chief Minister of W. Bengal
Died on 1st. July, 1962.

In memory of Dr. Rajendra Prasad who was an illustrious student and teacher of this institution.

Dr. Rajendra Prasad, the first President of Indian Republic, was born in a Bihar village in December, 1884. He was the fifth and the youngest son of a land-lord. Dr. Prasad had a bright academic career which began in 1902 when he passed the Matriculation examination of Calcutta University topping the list of all successful candidates. He took his M. A. degree from Presidency College, Calcutta, and B. L. degree from the University Law College, Calcutta. He acted as a teacher of this college for two years (1914-16). Dr. Prasad may be regarded as the true child of India in his mode of life and thinking. Throughout his life he never quested for power or wealth. His spectacular rise to the highest honour of the country was the result of sincere work and zealous adherence to the cause of people.

In 1917 he met Mahatma Gandhi and led the Champaran Satyagraha against indigo plantation, and since then become one of the most devoted disciple of Gandhiji. He belived in the Gandhian way of life and was deeply absorbed in the philosophy of the former. Non-violence was a way of life to him rather than a modus operaandj. So he opposed the attitude of the Congress High Command at the outbreak of the Second World War when the former was contemplating of co-operation with the British Government if their basic minimum demand "Swaraj" was accepted. As a protest he resigned from the Congress Working Committee in which he remained as a member from 1922 to 1950. He was elected to Congress Presidentship for three terms. In 1945 he joined the interim cabinet as a Minister in charge of Food and Agriculture, and in 1946 he was elected President of the Constituent Assembly to frame the Constitution of India. He was also a member of the "Partition Council" headed by Mount Batten. At this time his monumental work "India Divided" was first published on the 26th January 1950. He was elected President of the Indian Republic for the interim period and for two subsequent terms. Four hundred millions of people of India saw him with the greatest pleasure as the first citizen of this subcontinent for ten years.

In Dr. Prasad we not only found an untiring disciplined soldier in the struggle for freedom but also in him we found an able pilot to manage the affairs of the state. As a President he set an exemplary code of conduct for his successors. His behaviour throughout his career as head of the state was earnest, dignified, and in accordance with the spirit of the Constitution.

On the eve of his departure his words "speaking from the heart" to the members of Parliament reflect that the Gandhian values of life were still a vital force in him.

IN MEMORY

RESOLVED—

That this meeting of the teachers and the students of the University College of Law, Calcutta, expresses its heartfelt sorrow at the sad demise of Dr. B. C. Roy, the Chief Minister of West Bengal, and recalls with great pride the multifarious activities of the illustrious personality.

Dr. Roy as an outstanding physician, a far-sighted statesman, a great politician, an architect of industrialised West Bengal, devoted his whole life to the cause of our Mother Land. In every walk of life he set an example which would remain for ever as a morning-star before the people.

Dr. Roy's services to education in Bengal in diverse fields are remarkable. He was the oldest member of the Senate of Calcutta University and was connected with this University, his *Alma Mater*, for nearly half a century. He was also its Vice-Chancellor.

This meeting conveys the deepest grief to the members of the berieved family and shares the feelings of sorrow of the millions of grief-stricken countrymen.

May his soul rest in peace !

The 12th July, 1962

Foreword

BY

PRINCIPAL DR. P. N. BANERJEE, *M.A.B.L. D.Litt. LL.D. Barrister-at-Law*
Vidya-Vachaspati

As usual, at the request of the Editors, I am writing a foreword to the Law College Magazine—"Law Journal". The journal is full of very valuable and instructive articles from distinguished persons in India and abroad. The Magazine opens with the study of "Contemporary Law and Economic-Social Problems" by Professor Osvaldo Illanes Bentitez of Chile. The learned author's thesis is based upon the inseparability of economic law and social law. He desires a closer consideration by jurists of economic development and underdevelopment. His information about the income per capita in some of the countries of the world should be marked underlined, studied by our jurists, our statesmen, our legislators. According to the statistics prepared by the CEPAL, income per capita in North America (in 1957) was 2,050 dollars; East Indies, 1,090 dollars. The countries of European organisation for Economic Co-operation 690 dollars; Latin America, 280 dollars and Asia, 100. Economy indeed cannot be separated from law. Perhaps in future, the learned author will deal with the question as to how the economy of a country can be made effective by flexible and harmonious rules.

Dr. K. M. Munshi's address on the very important subject "Whither Fundamental Rights" in the Third all India Law Conference is an article full of erudition and of mature experience of one of the most distinguished statesmen, and a man of letters in India. Dr. Munshi apparently does not believe in the regimentation of belief or of religious attitude through state controlled legislation or indoctrination or indirect suppression of freedom of conscience. They all constitute a negation of basic freedom. Dr. Munshi deals with guaranteed rights under Art. 19 (1) of Indian Constitution. He quotes with great clearness of thought the relevant decisions of the Supreme Court and is definitely of opinion that "reasonable restrictions" mentioned in the Indian Constitution should be determined in an objective manner. Dr. Munshi's analysis of an attempted coalescence of fundamental rights and directive principles of state policy by judicial decision shows how the fundamental rights guaranteed by the Indian Constitution can be "dislodged by currently accredited theories sponsored by the legislature." Dr. Munshi's view is that Art. 14 of Indian Constitution as it stands as a result of judicial decision today, practically affords no protection to the citizen. The most disputed proposition relates to the restrictions imposed upon Art. 32 of the Indian Constitution by judicial decision. Dr. Munshi is perfectly right when he states that as contradistinguished from U. S. A. "in India, the Rule of law is enshrined in the Constitution itself".

The story of Half a Century of Judicial Developments in regard to Workmen's Compensation by Samuel B. Horovitz is an interesting study for our country which is now attempting to introduce harmonious rules between labour and management. The learned author's account about slips and falls in the award of workmen's compensation is of very great importance for future legislation in this country.

Professor Dr. M. J. Sethna's study on International Court of justice is an excellent philosophical account of international world as it should be. His very optimistic opinion that "there should be a universal treaty whereby all States should agree to refer all their disputes to this Court, and not to resort to interpretation of treaties or international law or custom by themselves." Is a counsel of perfection Dr. Sethna would abolish the veto power of the Security Council of the U. N. and would introduce a compulsory system of criminal jurisdiction, and would like to invest the International Court of Justice with that jurisdiction. These are words pregnant with celestial fire.

Mr. Narasa Raju, the learned Advocate General of the Andhra Pradesh, has written on "Compulsory Acquisition and Public Purpose". His study of public utility and the delimitation of the boundaries of "luxuries and necessities" is a concept which all sections of the country take some time to digest and assimilate.

Mr. Justice P. B. Mukharjee, our Dean of the Faculty of Law, has dealt with the subject of "Psychology and Law". He deals with the significant part played by psychology in law, and its valid administration, in his inimitable language. "Law" he says, "depends on psychology, for its aspiration, enunciation and application." He analyses his ideas on a four dimensional view on the problems taken up by him, viz. (1), psychology of law, (2) psychology of judges, (3) psychology of lawyers and (4) psychology of litigants. He argues cogently and vehemently that the psychology of behaviour, individual, social or group, is an integral part of law, its contents and its machinery. The psychology of Judge indeed is a counsel of perfection. Jurisprudence indeed must recognise at once the significance of the role of psychology in law.

Mr. Justice D. N. Sinha deals with the "Chinese Aggression and International Law". That problem a world problem ; one-third of the total human race is involved in an "undeclared war". Mr. Justice Sinha categorically states the five basic principles of *Panch Seela*, and points out with great emphasis that the five principles of peaceful co-existence were proclaimed by India and China. The Chinese absorption of several thousands of square miles of land at Ladakh and her unabashed aggression on a massive scale on the North-Eastern Frontier of India are a direct negation of the principles involved in the doctrine of *Panch Sheela*. Mr. Justice Sinha reminds the world at large that the principles of *Panch Seela* were adopted by many of the countries of the world including the Soviet Union. Three-fifths of the total population of the world at Bandung in Indonesia accepted the principles in 1955. The question is often asked whether the United Nations has any jurisdiction with regard to this unabashed aggression when a non-member state is the aggressor. Mr. Justice Sinha's article gives the correct answer. "China", according to him, "has fully availed itself of the machinery of the United Nations, although she is a non-member State", and the

United Nations, has, according to him jurisdiction in regard to this vital question. The question is, neither India nor any State in the world has yet put the case before the United Nations. Diplomatic relationship between India and China has not yet been cut off.

Mr. Samiran Sen has dealt with his "Visitors" in his office of the Deputy Sheriff of Calcutta. I have great sympathy with his earliest visitor who claimed the sum of Rs 737000/14/3 for arrears of rent covering a period of more than one hundred years. That visitor, like myself, is an M. A., B. L. of Calcutta University. Mr. Sen is very lucky that a cup of tea bought him over. The recitation of poem by one of his visitors reminds one of the recitation by De Lisle of the French National Anthem. At the time of that earth shaking event—the French Revolution.

Professor Nakuleswar Banerjee has x-rayed the Chinese aggression. He regrets that "the aggression is the worst type of political blackmail of a friendly nation which a co-sponsor of the Panch Seela has steadfastly pleaded for China's membership of the United Nations". The learned author discusses the proposition whether the United Nations has competence and jurisdiction to deal with the matter. He is quite right when he says that "India has a dual role in this crisis of human civilisation, firstly as a victim of aggression and secondly as a member of the united Nations". He visualises a new polarisation of political forces. He also wishes Tibet to get out of the clutches of China. Is he expecting too much?

Professor J. L. Bhattacharya has, in his learned article, dealt with the question whether in taxation matters the payment is in the nature of capital or revenue. He has discussed Lord Haldane's test and dealt with the doctrine of maintenance and reservation of assets with great clearness of thought.

Professor Tapas Kumar Banerjee's article on the Indian Police Act, 1861 will be read with interest by every student of history and every student of the law of crimes. It is a matter of great wisdom exhibited by Sir Bartle Frere that the Act in question is very brief and consists of only twenty sections.

Mr. Asit Kumar Chaudhuri has dealt with some aspects of women's estate in Hindu Law. He is of the view that Hindu women had absolute rights over heritage according to the view of the Mitakshara based upon the text of Katyana. According to him the Dayabhaga for the first time makes the definite pronouncement restricting rights of widows and women generally, in inherited properte.

Mr. Sachin K. Ray discusses Administrative Tribunals and the Principles of Natural Justice. In the words of the learned author, "the growth of modern governmental activities and introduction of new services provided by the State have led to the creation of numerous new special tribunals for the settlement of disputes of determination of rights." His views have been amply illustrated by reference to Indian Constitution as well as to leading cases, both Indian and British. His article requires special study by all students of law in view of the proposal to have a central court of appeal in regard to administrative tribunals in this country.

Mr. Prabhakara Jha, a former Secretary and Editor of this journal, has written on "Freedom of the Judiciary in India." He agrees with Sir Winston Churchill, the Prime Minister of England, that "the Judge has not only to do justice between man and man. He also to do justice between the citizens and the state." His reference to the famous Nanavats case, who was condemned by the high Court, is a timely reminder against executive interference with judicial decisions

Mr. Thankappan Nair has written an excellent article on the Asura form of marriage in Assam. He has analysed the genesis of bride price, discussed the basis of bride price and has made comprehensive view of that question amongst the Nagas, the Kuki-Lushais and the tribes in the North-Eastern Frontier Agency as also the people of the vallies of Assam. His statement that the children of the same mother by different fathers map marry among the Lakhers and his statement amongst the Miris of the Subansiri Frontier Division marriage is allowed with stepmothers and brother's widows are startling proposition fit for further anthropological studies.

Mr. Sunwarmall Pithisaria has made pertinent observations on income and the Income-tax Act of 1961. His observation about the vagueness of the definition of the expression "income" in the Income-tax Act are worth a critical study. Indeed Sir George Lowndes' and Lord Russell's views as also the views of Lord Wright deserve careful consideration. The learned author has however given the palm to Justice Pitney of the United States of America in the matter of definition of income.

Mr. Suhrid Basu Mallick has discussed Crime and the Criminal. He has divided crimes into three classes—the insane criminal, the criminal by passion, and the occasional or accidental criminal. He has given due attention to heredity and environment. Perhaps in his further article he will explain how potential murderers could be treated in clinics.

Mr. A. R. Biswas has made an elaborate study of the Indian Constitution at Work. His thesis on the relation between the executive and the judiciary, the theory of constitutional Trust, Delegation of Legislation and the Interpretation of Constitution will be studied by every serious student of history and of law. His question, viz. 'Is democracy an essential prerequisite of constitutional government? Still requires solution.

Editorial

Chinese Aggression

The most outstanding event in recent history is the ruthless Chinese invasion on Indian territory in the last quarter of the last year. On the 20th October, 1962, the Chinese invaders launched a massive attack on both the Eastern and Western sectors of our motherland. History of India has witnessed invasions of our motherland in different ages from different quarters-but perhaps the most cruel and treacherous attack came from beyond our northern border. One who keeps in mind the traditional friendship and cordiality developed between these two countries through diffusion of cultural and religious ideas, can hardly expect this sort of behaviour from China. The sudden attack came as a rude shock because it came from a country whose cause India had advocated consistently year after year.

However, the reactions to the Chinese aggression within and outside our country are important and pregnant with immense possibilities. All the civilised countries of the world except a few condemned Chinese invasion and sent messages of sympathy for India and promised support to her cause. A wave of indignation flowed over the western world and England, America and some other countries extended their hands of co-operation warmly. This wanton Chinese aggression proved that imperialism is not even a dead

horse; it is now grabbed in socialism.

The attack of so-called Socialist China upon a democratic country challenged the biggest democratic experiment in Asia and threatened its successful implementation on the Indian soil. Evidently the future of democracy in Asia depends largely upon how this challenge is met. Another lesson of the Chinese invasion upon a country pledged to the principles of peace and fraternity, is that the Chinese world is not yet ready to change the traditional way of settling a dispute with brute force.

However the reaction of the Chinese invasion within the country is pleasantly surprising. In fact, in times of crisis like this, a nation shows its mettle, and it is an object of pride to note that India has done so. Our people have demonstrated it in an ample measure, and they have united in determination to free our soil from the invaders. They are willing to court any amount of suffering and make any amount of sacrifice necessary to achieve that end. Gone are the days when petty differences and dissensions over trivial issues had caused division in our ranks. All these petty differences have been swept away by a wonderful upsurge of patriotic fervour which now unites the entire Indian nation determined to throw back the treacherous enemy, from her sacred soil.

A note on Chinese Aggression and U. N. Charter

Though China has committed unmistakable aggression against India, the Prime Minister has emphasized that India will continue to follow her policy of non-alignment and that the

real hope of mankind still lies with U. N. The question, therefore, arises as to the remedies available to India in International law.

It seems that under the U. N. Charter these are four :

(1). India can continue to act alone in defending her territory in exercise of her inherent right of individual self-defence under Article 51.

(2) She can enter into treaties of assistance with friendly countries in exercise of the right of collective self-defence under the same article.

(3) She can seek intervention by the Security Council either Art. 51 or under Art. 39, 41 and 42.

(4) Finally, should the Security Council fail in its task for lack of unanimity among the permanent members, intervention by the General Assembly is possible under Art. 10, 11 and 14. Both the third and fourth remedies were applied in the Korean conflict.

Self-Defence—The right of self-defence under Art. 51 arises in the case of an illegal armed attack, an act of aggression as distinct from mere threat. This right India is at present exercising.

Art. 51 confers the right to use force not only upon the attacked state but also upon other states which assist it in its defence. The scope of collective self-defence measures, however, is much wider than ordinary commercial bargains for the import of conventional armaments. It is, therefore, open to India should so desire to enter into treaties of assistance—military, economic and financial with other friendly states in aid of her defence. Measure so taken will be conformity with the letter and spirit of Art. 51 of the Charter which Julius Stone once described as an “escape

clause”, to convey the impression of a residual remedy in a situation where machinery of the U. N. is of no avail. Should India decide to enter into such treaties of assistance with states, she considers friendly, she will not be committing any breach of her principle of non-alignment. The right of self-defence thus exercised will be a legitimate right to resort to war.

Intervention.—So far as the third remedy, *Viz.* intervention and effective action by the Security Council is concerned, the jurisdiction of Council could arise in two ways : either under Art. 51 or under Art. 39, 41 and 42 of the Charter. Under Art. 51 members exercising the right of self-defence are under an obligation to report measures so taken immediately to the Security Council. Once reported the Council is expected to take necessary steps to restore peace and security under Art. 51 even without determining existence of an act of aggression. The alternative method of inviting the jurisdiction of the Council shall first determine the existence *inter alia* of an act of aggression and shall make either recommendations or take decisions to enforce measures under Art. 41. While Art. 41 deals with measures not involving the use of armed force. Art. 42 deals with the employment of armed force by air, sea or land.

The most striking example of successful intervention by the Council is to be found in the Korean Conflict. When the North Korea invaded South Korea, the Council took the action under the authority of three resolutions. It was possible for the Council to adopt the resolutions and to take actions in the absence of Soviet Union. Although because of this the validity of the resolution was challenged by the Soviet Union, the International lawyers have held that under Art. 27, the presence of all the

permanent members is not required for a valid decision of the Council on a non-procedural matter; only the concurring votes of the permanent members present and voting is necessary.

In case the question of the Chinese aggression on Indian territory comes before the Council for its consideration, one of the two things might happen. A permanent member may abstain from voting or it may exercise its veto with regard to the measures that the Council may suggest. If a permanent member should abstain from voting, then following the Korean precedent the Council would be fully justified in recommending or taking any enforcement measures which it may consider.

Should, however, the security Council be paralyzed by the veto of a permanent member the Korean case affords another comparable precedent. With the return of the Soviet representative to the Security Council, it became clear that no further action would be possible. Attempts were therefore made

through a liberal interpretation of Art. 10, 11 & 14 of the Charter to entrust the General Assembly with responsibility for international peace and security. The "unity for peace" resolution was adopted by the Assembly by a large majority. The text of the resolution provided inter-alia, that if the Council failed to maintain peace and security, the Assembly should consider the matter immediately and could make recommendations to its members "including in the case of a breach of the peace or act of aggression, the use of the armed forces when necessary to maintain or restore international peace and security."

New System—The new system of collective security embodied in the "uniting for peace" resolution found its concrete application for the first time in a resolution of the Assembly adopted on February 1, 1951 in the Korean Conflict. The resolution was originally placed before the Council but was rejected because of Soviet veto. Thereafter it was approved by the Assembly.

Vivekananda Centenary

The hundredth year of Vivekananda's birth is celebrated throughout the country with great enthusiasm. Vivekananda, the most devoted disciple of the sage of Dakshineswar, was really a true child of the nineteenth century renaissance. Rabindranath rightly said that "he was the very connecting link between the East and the West, a perfect synthesis of all that is best in Eastern and Western cultures, in fact and truth an international personality." Even now we perceive his influence working slowly but steadily in us although we do not know exactly where and how. His conception of social service and duty to man ideally expressed in these proverbial words "he who

serves man serves God" is powerfully working in the current social philosophy. In the Parliament of Religions at Chicago he upheld the ideas of harmony, peace and assimilation.

In the field of reawakening of India his contribution is unique. He was the architect of neo-Hindu nationalism which played the most vital role in the growth of modern India. The revolutionary movement of Bengal which rocked the British rule in India in the early years of this century got a tremendous impetus from the teachings and ideas of Vivekananda. The works of this great Saint were compulsory subjects of study for the members of the secret societies of those days who dreamt of liberating

India. In the later days Subhas Bose came and dominated the Indian political scene, largely influenced by Vivekanand's immortal teachings. Indeed the life and political philosophy of the former was largely influenced by the ideas of the latter. In these days of disunion and disintegration of our motherland we can

see hope and find consolation in the inspiring words of this great saint—"India will be raised not with the power of flesh but with the power of the spirit, not with the flag of destruction but with flag of peace and love—say not you are weak—the spirit is omnipotent."

Unrest in the Middle East

The chequered history of the Middle East is full of Bloodshed and tears. The change of Govt. through military coups is a domestic affair in Middle East. Within a span of six months we have seen three military coups in Yemen, Iraq and Iran. In the post war period almost all the Arab States secured political autonomy but their political independence is not backed by sound economic development. Commercial exploitation by the local feudalists and foreign capitalists have pressed the economy of these countries, to the lowest range of poverty. Oil is the main source of wealth but it is monopolised either by western capitalists or by local feudal lords. None of them pay any attention to solve the problems basically poverty of the people. So the ambitious military leaders take this opportunity and utilise the discontentment of the people to fulfil their own desires. So the Govt. change so frequently because it is not supported by the loyalty of political conscious

public opinion. Besides the internal problems there are certain external factors too. Both the power blocks, to west and the Soviet Russia desire to maintain balance of power in the middle east. They always keep a vigilant eye on these oil riched valleys. Moreover the problems of Middle East have always played a vital role in the game of diplomacy that old tradition is still followed even now a days. The lengthening shadow of the Russians' bear was always apprehended by the British Lion since the last century. The power block has been readjusted but the old outlook has not been re-oriented. The same old policy of maintaining balance of power is still followed by the diplomats. People are still considered as mere puppets in the game of diplomacy. If the economic conditions is not changed and welfare of the people is not aimed at none diplomatic games and upsurges military would solve the problem of the middle east.

Congratulations

We conclude our editorial by reference to a very well deserved success of one of our distinguished predecessors Shri Prabhakara Jha. Shri Jha passed the M. A. examination in French of this University this year. He was placed Second class first, this year. There was no first class. This is an achievement of which he and his friends should be proud of.

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permanent members is not required for a valid decision of the Council on a non-procedural matter; only the concurring votes of the permanent members present and voting is necessary.

In case the question of the Chinese aggression on Indian territory comes before the Council for its consideration, one of the two things might happen. A permanent member may abstain from voting or it may exercise its veto with regard to the measures that the Council may suggest. If a permanent member should abstain from voting, then following the Korean precedent the Council would be fully justified in recommending or taking any enforcement measures which it may consider.

Should, however, the security Council be paralyzed by the veto of a permanent member the Korean case affords another comparable precedent. With the return of the Soviet representative to the Security Council, it became clear that no further action would be possible. Attempts were therefore made

through a liberal interpretation of Art. 10, 11 & 14 of the Charter to entrust the General Assembly with responsibility for international peace and security. The "unity for peace" resolution was adopted by the Assembly by a large majority. The text of the resolution provided inter-alia, that if the Council failed to maintain peace and security, the Assembly should consider the matter immediately and could make recommendations to its members "including in the case of a breach of the peace or act of aggression, the use of the armed forces when necessary to maintain or restore international peace and security."

New System—The new system of collective security embodied in the "uniting for peace" resolution found its concrete application for the first time in a resolution of the Assembly adopted on February 1, 1951 in the Korean Conflict. The resolution was originally placed before the Council but was rejected because of Soviet veto. Thereafter it was approved by the Assembly.

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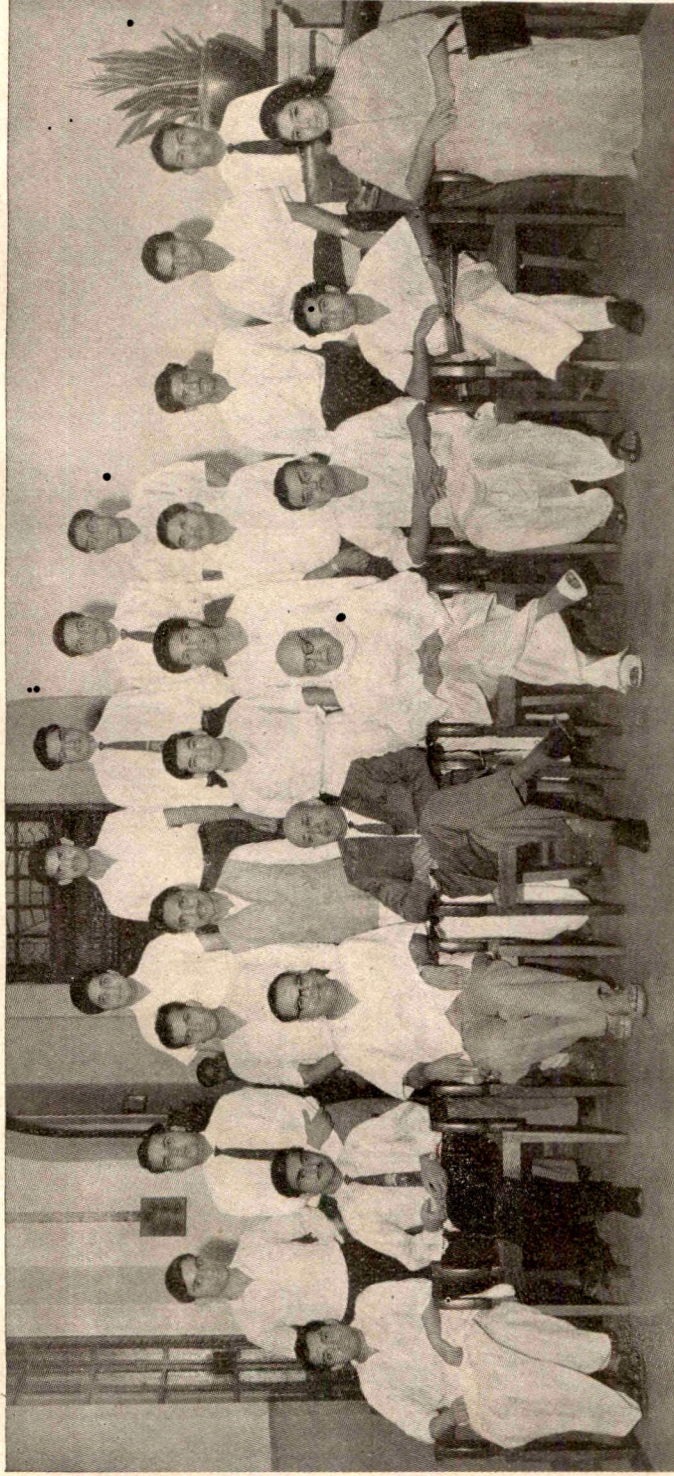
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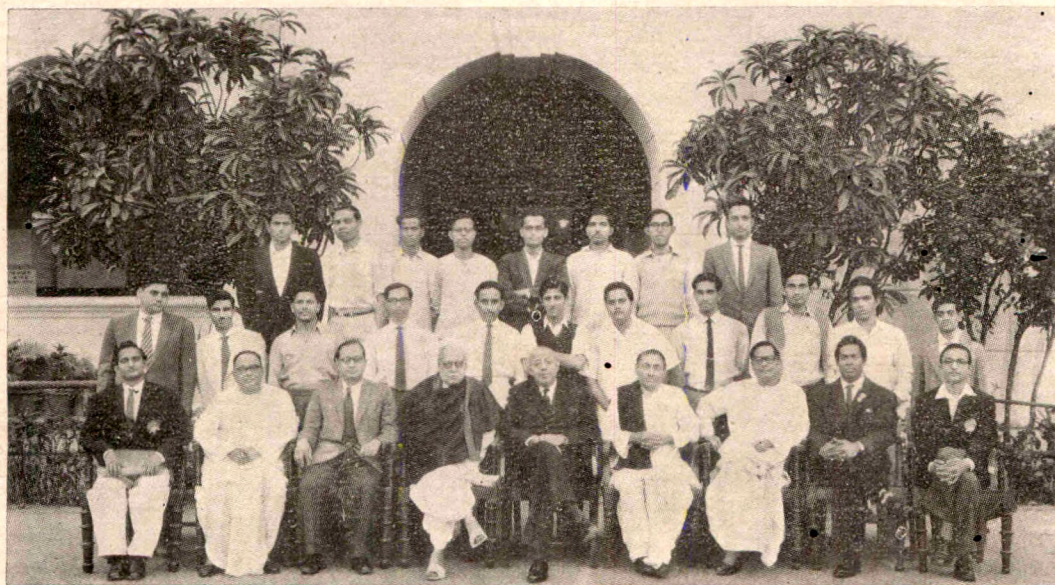
UNIVERSITY COLLEGE OF LAW (SESSION 1962—63)

OUR SPEAKERS



Sitting (L to R)—B. Ghattak (Jt. Secy.), Samir Gati Ray (Jt. Secy.), Prof. S. A. Masud. Sri B. B. Malik (Vice-Chancellor), Dr. P. N. Banerjee (Principal), Shyamal Chatterjee (Gen. Secy.), Pranab Mukherjee (A.G.S.), Mridula Sicka.
Standing (L to R)—J. K. Somani, B. Guha Mazumdar, Udit Chaki, V. S. K. Rao, S. Maitra, B. Chatterjee, S. P. Gupta, S. Basu Malik, A. Dutta, S. Mishra.
2nd Row Standing (L. to R.)—A. Tibriwal, H. Paramanik, B. More, S. C. Sukhani, S. Nag.

UNIVERSITY COLLEGE OF LAW GYMNASIUM
CALCUTTA 1962—63



Sitting (L to R)—A. Chakraborty (Jt. Secretary), Dr. Anil Ch. Banerjee, Prof. S K. Mitra (President), Dr. P. N. Banerjee, Principal (C. U. Law College), Sri B. B. Malik, (Vice-Chancellor) Prof. S. C. Roy Choudhury (Supt. Hardinge Hostel), Dr. G Roy Choudhury, (Register) Sri M. Roy, (Mr. Universe), L. K. Chatterjee (Jt. Secretary).

1st Row Standing—A. N. Das, S. P. Bhatia, S. P. Dey, A. Matin, D. Banerjee, A. Bhattacharjee, B. (L to R) Banerjee, K Mukherjee, P. C. Ganguly, P. C. Bhadra, U. K. Nath. ••

2nd Row Standing—Arun Roy, A. Roy, Harakrishna (Bearer), A. Choudhury, B Nayak, H. C. Pandey, (L to R) B. Das, S. Basu.



Ranjit Kumar De and his Party

Contemporary Law and Economic-Social Problems

BY

OSVALDO ILLANES BENITEZ

Santiago, Chile.

1.—The Law as a Social Fact and the Human Will.

Without any doubt, law and human discipline are based on a constant struggle. Thus Ihering was right in saying that it was necessary to fight for the realization of the law. It does not originate spontaneously, but is born as a result of the discussions in the debative terrain, when favorable and unfavorable opinions are voiced. Its formation not only involves a tangible fact originating from social relationships, but an ideal, patterned on sentimental and spiritual motives.

It is undeniable then, that it possesses perpetual energy, since its force stems from the human will, molded by facts generated through endless social usages or habits.

Much has been said concerning the primary stages of law. We shall not follow the jurists in this long discussion. We can only say that social science has a decisive influence on its doctrines; but neither can we deny that an ideal is always present in its development, created by the opinions of jurists and through jurisprudence.

It is mainly from the latter that law acquires its vital force. The law can only exercise its true functions by application, which gives society the necessary security to enable its indi-

vidual components to live and work with assurance.

In the Anglo-Saxon countries, judiciary law is exercising an important influence, just as in Ancient Rome during the praetorship. Edward Lambert has written a book entitled "Government by Judges", on this same subject. Therefore, it is said that in those countries "The absolute nature of the written law and its eminent role are strongly attacked, if not annulled, by the entire judiciary practice."

The ever increasing business range has created a new system of law in the international terrain, in addition to positive legislation, originated by commercial, professional and syndical practices, and there is also "an international corporative law of sales and purchases, not supplementary to or an adaptation of legislative or judiciary laws, but as a law in itself, having its own spirit, methods and sanctions."

In this constant evolution of the law, we cannot fail to mention the scientific discoveries and community associations, which have produced a veritable revolution in economic, social and international law.

However, in this brief analysis which we have prepared, we must not lose sight of the fact that the law, in accordance with Kelsen's doctrines, is essential for the promotion of peace—man's spiritual and material peace.

2.—The Law Versus Economy.

These two basic structures of representative democracy do not always move in harmony. The jurists have not as yet come to an agreement with the economists, and vice versa. Today economic events take place so rapidly that the law requires flexible rules, capable of channelling precise events within the varied range of the world of business.

It must not be forgotten that economic phenomena are a branch of sociology, and these must be studied by jurists in law schools, in accordance with the new doctrines that are being created in this respect. For instance, it is interesting to demonstrate the transformations in the economic bases of the property laws under the influence of such factors, and the repercussions of the rules of law on economics.

The very foundations of the property laws are of an economic nature. Civil, Commercial and Administrative Law, although applicable to different economic motives, partakes of the same nature. The first of these legislates on the use of property by individuals, with respect to persons or families; the second, on the exploitation of property, capital, lucrative profession, enterprises, etc.; and the third, on matters pertaining to public communities, administrative contracts, public works, public service measures for regulating monetary activity and which seek an economic basis for the general interest. (1)

The profound transformations that the law

has undergone owing to economic factors, cannot be denied, particularly today, in view of the extraordinary technical means which are available, and the main preoccupation of people and governments is the development of economy.

The formation of both European and American free trade international associations, with their consequent super national powers, where the majority members may reach certain decisions that are obligative for all associate countries involves various innovations with respect to legislation in each country.

The law must not only be applied to factual requirements, but should also find its inspiration in ideas, concepts relating to economy, and justice for producers and consumers, employees and workmen. As opposed to physical nature science, economy is man-made; wealth has no other value than to satisfy man's requirements, and thus, if he encounters economic limitations, he has the power to act either with respect to the causes, to eliminate them, or to the results, to improve them, and this he does to bring order to the economic system for his own good, and to ensure justice in the distribution of wealth. Economic events provide the thoughts that are the law's inspiration and which serve justice precisely. (2)

The Law, therefore, cannot turn its back on reality.

3.—Economic Law and Social Law are Inseparable.

In the sociological field the Law is a social institution, and History teaches us that all human society has its own right, i.e., order in its external life.

In the most backward countries where no

NOTE: (1) J. Brethe de la Gressaye—"Droit et Economie".

„ (2) J. Brethe de la Gressaye—"Droit et Economie".

political organizations exist and where there are no Courts of Justice or any way for people to present complaints or demands to secure official decisions, there is evidence, nevertheless, of the existence of law, manifested in the approval or disapproval of tribal members.

But no matter what the scope of the law may be in society, it is above all a concrete reality for the attainment of man's spiritual and material development, and it is in the latter aspect where the economic factor plays a decisive rôle. A low standard of living cannot offer peace of any kind, which is its supreme aim.

The economic factors stemming from facts and ideas are innumerable. Technical developments may be cited (mechanization of agriculture, automatism in industry, discovery and exploitation of oil deposits, utilization of nuclear power), and among social ones, with their natural repercussion on economy, the following should be mentioned: the extension in the activities of the workmen, the subdivision of the working class into different groups, the reenforcement of the middle class, and the general desire for a higher standard of living.

Monetary phenomena can also be mentioned, as for example the abandonment of the gold standard after World War I; International events of transcendent importance today, such as European and Latin American economic organizations.

All these economic and social factors, which are not the majority by any means, merge together to form a social-economic law. As in the case of commercial and industrial activities, the former integrate mutually.

IV.—Economic Development and Underdevelopment.

These questions emerge as a substratum of our present civilization. As has been said, they are made up by innumerable complex and varied factors, which are aggravated by the huge expenses of maintaining a cold war, and that are constantly changing with the scientific discoveries that provide new directions for industry and commerce and, lastly, with the increase in population, which in some South American countries is almost 4%.

All these facts create problems that are difficult to solve and if not faced opportunely, produce confusion and inflation, with grievously harmful effects on the economy of a country.

The economic development of a country depends mainly on the realistic planning of the procedures for increasing property availabilities and distributing periodically the gross national produce of a country, the former dedicated to the consumer population to satisfy its immediate needs, and the latter, without which it would be impossible to meet consumer requirements or guarantee their future development, to investments, such as capital, equipment, fixed assets; in short, all the elements that renew, improve or create sufficient property for the economic expansion of a country.

To summarize, the efficient planning of the economy of a country depends on a constant analysis of the varied elements which emerge from practical observations and the execution of profound structural transformations to provide an impetus for the productivity of each country through the improved application of techniques, and to foment, increasingly, the industrial processes in order to amply

satisfy internal consumption and to make available an appreciable surplus of goods to facilitate the formation of a system of integration with other countries.

No doubt an important factor in economic development is the technical instruction for the different productive operations. This not only helps to maintain the working elements, but at the same time, to improve the actual work as regards both quantity and quality.

Equally important is a moral, social and civic education in the infinitely graded world of business interchange, where good faith is an essential requisite, as is true of all contracts.

The economy of underdeveloped countries which deviates from the above precepts, reflects lower incomes per capita and a notorious discrepancy between the total personal incomes of the lower scale groups and those of the higher ones. This does not happen in developed countries, where the tendency is towards a reduction of the discrepancies in incomes as far as distribution is concerned.

The statistics prepared by the CEPAL give the following information on incomes per capita: North America (year 1957) 2,050 dollars; East Indies, 1,090; the countries of the European Organization for Economic Co-operation, 690; Oriental Europe, 490; Latin America, 280; Middle East, 240; and Asia, 100.

In order to overcome the obstacles for economic development, it is necessary to break away from traditional systems, improve the quality of productive factors and the adequate distribution of the same among the various sectors of economic activity in order to adjust these more closely and speedily to the new procedures for internal and external demands.

The economy of a country must be flexible,

since rigidity in this respect can only subsist in totalitarian systems, where the economy is wholly directed and where private initiative has no place in the maelstrom of the business world and which, in addition, must be combined with statal initiative.

V.—The Influence of Economic Development on Public Law.

Undoubtedly, in these times, jurists and economists should come to an agreement in order to work jointly for the solution of socio-economic problems, since it is undeniable that today, owing to the complexity of these problems, it is indispensable to have a flexible legislation which can be accommodated to the surprising changes in economic events.

Statal administrations should have such laws in order to adapt them, without delay, to the new circumstances originating from such factors. In this way, functionaries will also be able to move rapidly in order to resolve such matters, without the intervention of a ponderous and useless bureaucracy.

The common market associations between various countries, which at present are producing wonderful economic results, are introducing new procedures into International Law, as concerns contributions, taxes, customs duties, etc., and are creating super national powers for these matters in each one of the associate nations.

Penal Law acquires, likewise, a new physiognomy. Economic crime makes its appearance and sanctions for those who break this law and harm society. These criminal acts may be of various types, and are more likely to take place in underdeveloped countries, for obvious reasons.

Constitutional Law is also affected by underdeveloped economies. This phenomenon is also noticeable in nations which have not as yet achieved juridical, political or civic maturity. The social classes are stirring and causing alterations in the juridical order through strikes, in preparation for future dictatorships.

Illegal or political strikes have a disastrous effect on the economy of a country, particularly on the basic economies. An alteration of this nature entails a corresponding breakdown in the social order, with evident damage to the juridical system.

It is, therefore, necessary to conclude that economy cannot be separated from law. If economic factors are essentially flexible, then the juridical rules must also be so.

The law cannot cease from being a vital and tangible force in the constant succession of economic events, through which it acquires new procedures.

The law can make the economy of a country effective only when they both enjoy flexible and harmonious rules.



The Third all India Law Conference

“Whither Fundamental Rights”

BY

DR. K. M. MUNSHI

Chairman

I

Rule of Law and Fundamental Rights.

1. When we consider the question ‘Whither Fundamental Rights’, the point from where the journey forward or backward begins has to be measured. That point can only be the 26th January 1950 when the People of India as a whole organised in the Constituent Assembly established a Sovereign Democratic Republic and gave the Constitution to the country.

2. My active interest in Fundamental Rights began in August 1946 when I began drafting the Constitution for India as an exercise for myself. It grew from one stage of the Constituent Assembly to another till Part III emerged as a part of the Constitution finally adopted. Now, having watched their fortunes with anxious care, I am constrained to confess that during the last few years the scope of several Rights has been considerably narrowed down by judicial decisions in several respects.

3. This process can be traced to recent trends in judicial decisions which, apart from individual cases, fight shy of firmly upholding the paramountcy of Fundamental Rights. This can be attributed *inter alia* to :

(a) a growing decline in that sensitive concern for the constitutional paramountcy of Fundamental Rights which characterized the judiciary in the early post-freedom years ;

(b) an increasing, though unconscious, bias in favour of legislative wisdom, if not supremacy, possibly resulting from our close association with British Constitutional law ; and

(c) an inability to resist the influence of economic theories marketed by politicians in tabloid slogans of vague implications.

4. The Constitution, founded on the concept of free democracy, embodies in specific terms of precise content what is loosely termed “the Rule of Law”. It rests on inalienable rights of the individuals as the firm pillars of a structure. Its inspiration is drawn, through the American Bills of Rights, from the constitutional doctrine that there is a natural law paramount and superior both over the Executive and the Legislature.

5. The philosophers and jurists who developed the fundamental aspects of this doctrine in England were as much concerned with the supremacy of the Parliament against the arbi-

trariness of the Executive, as with the vindication of the rights of man against Parliament itself. (1) In *Calvin's Case*, Lord Coke stated *inter alia* that "the law of nature is before any judicial or municipal law in the world; (and) ...that the law of nature is immutable and cannot be changed." (2) In recent times Fundamental Rights are traced not to natural law, but, as stated in the Declaration of Delhi adopted by the International Commission of jurists in 1959, (3) have been traced through history in the age-old struggle of the mankind. This doctrine in one shape or the other came to be adopted by most of the written constitutions of the world and culminated finally in the adoption of the Universal Declaration of Human Rights. (4)

II

The Preamble and the basic Freedoms.

6. By the Preamble of the Constitution, the People of India, while solemnly resolving to constitute India into a Sovereign Democratic Republic, reserved to all its citizens—

"LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity;" to secure a firm base for the free democracy they were founding. The other objectives in the Preamble have no relation to democracy. They could be attained in a measure even under a form of government which denies freedom to the individual.

7. The right to freedom of speech and expression, including that of the press, lies

"at the foundation of all democratic organisations, for without free political discussion, no public education so essential for the proper functioning of the process of popular Government is possible". (5)

8. Liberty of belief, faith and worship are closely associated with liberty of thought and expression. The central idea is that a healthy democratic system can only survive if the citizens are at liberty, and in fact invited, to scrutinize and re-examine currently accepted opinions. Regimentation of belief or of religious attitudes through State-controlled education or indoctrination or indirectly through suppression of freedom of conscience, is a negation of basic freedoms.

9. The Preamble also clearly indicates that the object of the Constitution was to maintain the dignity of man, thereby accepting the concept of the sanctity of human personality. It is by virtue of this acceptance that certain Fundamental Rights are vested in all persons within the Union regardless of whether they are citizens or not.

III

Organic Unity of Citizens.

10. Another vital aspect dealt with by the Preamble and Article I is that the Republic, a Union of States, is based on national unity, that is, on the organic unity of all its citizens. The Union is the National Government of India, to which all citizens in the country are related not only by a common allegiance, but

NOTE: (1) H. Lauterpacht, *International Law and Human Rights*, London, 1950, 135.

(2) 1608, 7 Co. Reports 1. See Lauterpacht, footnote 24, *ibid*.

(3) *Journal of the International Commission of Jurists*, Geneva, Vol. II, No. 1, 17.

(4) See Kelsen, *The Law of the United Nations*, 1950, 33-39.

NOTE: (5) Per Patanjali Sastri J. (as he then was), in *Romesh Thappar v. The State of Madras*, 1950 S.C.R. 594; A. I. R. 1950 S. C. 128, 129.

by common Fundamental Rights vested in each one of them, together with the Right directly to approach the Supreme Court for their enforcement.

11. The ultimate sovereignty, however, rests in the people. To adopt the words of Chief Justice Marshall, 'we are one people' and because 'the people made the Constitution, they can unmake it', but then he added: "the whole body of the people and not any subdivision". (6)

12. Under our Constitution, the Union is a national, sovereign State with the character of nationality and possessing plenary powers. The States are merely subordinate political bodies which, juristically speaking, act as agents of the Union without any right to perpetual existence. Their formation and boundaries depend upon the will of the Parliament (Article 3). Their powers and functions can be seriously affected by Parliamentary action under certain circumstances (Articles 248, 249, 250 and 251), and in emergencies, suspended under Part XVIII. To quote Dr. Alladi, 'though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single *imperium* derived from a single source'. (7)

13. Article 15 prohibits discrimination *inter alia* on the ground of place of birth. Article 19 (1) (d) guarantees free movement

throughout the territory of India. Article 19 (1) (e) opens up the whole of the territory of India for residence and settlement. These guarantees have been given to ensure that the country is not fragmented into regional jurisdictions by State action.

14. Indians, therefore, like the residents of U. K. or any other sovereign country, can have only one domicile. Yet in *Joshi v. Madhya Bharat State* (8), the Court leaned towards, what I have called, an unconscious bias for English law when it approved the principle entirely inconsistent with the Constitution that a State in India is entitled to impose discriminatory regulation of its own on the basis of regional domicile.

15. Differing with the majority view, Justice Jagannadhas held—and, in my opinion, in conformity both with the spirit and the letter of our Constitution—that "the recognition, express or implied, of regional domicile by a decision of this Court would be contrary to the intentment of the Constitution". (9)

16. The majority decision, as it stands, narrows down the scope of both Article 15 and Article 19 (1) (b) and (d), and thereby affects the basic concept of our Constitution that India is a single country in which all citizens can move in and settle freely and enjoy the privileges and facilities available to every citizen without discrimination.

17. The Union of India is 'indestructible', 'perpetual', 'indissoluble' (10), with even much greater force than can be said of the U. S. A.

NOTE: (6) Willis, *Constitutional Law of the United States*, (1936) 61.

(7) Constituent Assembly Debates of 23.11.1949, 836.

NOTE: (8) *Joshi v. Madhya Bharat State*, 1955 (1) S.C.R. 1215; A.I.R. 1955, S.C. 334.

(9) *Ibid*, 346.

(10) Constituent Assembly Debates of 4. 11. 48, 43.

As to U.S.A. see—*Texas v. White* 7 Wall (U.S.) 700. *Knox v. Lee* 12 Wall (U.S.) 457; 20 L. ed. 287, Willoughby, *The Constitutional Law of the United States*, Vol. I, 2nd ed. New York, 1929, 137.

In this connection, a moot question may arise any day whether a citizen can constitutionally claim the rights of free expression, free assembly and free association in order to destroy the Union and thereby repudiate the very citizenship through which he enjoys these rights.

IV

Guaranteed Rights Under Article 19 (1).

18. Among the basic freedoms mentioned before, liberty of thought and expression is the most important, but it can only be effectively exercised when there is ability to do so. This ability is derived from the exercise of the Rights mentioned in Article 19 (1) (b) to (g). While each of them has an intrinsic validity and an importance of its own, all of them are in a way inter-related and inter-dependent, so as to form an integrated scheme for promoting and strengthening the basic freedoms.

19. Without the right to assemble and form associations and unions, free expression would be ineffective, as it would be restricted to activities of isolated individuals. The right to free movement and residence throughout the country is calculated to maintain national unity as well as to keep alive the consciousness of a common citizenship through the enjoyment of common rights throughout the country.

20. Effective, organised public opinion can never come into existence if the rights in Article 19(1) (f) and (g) are not enjoyed by the citizens in a substantial measure; for, without them, the financial support from non-governmental resources would not be available to sustain organised public opinion of an independent character.

21. Whereas the rights in Article 19 (1)

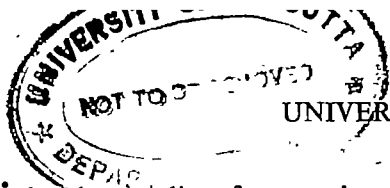
(b), (c), (d) and (e) provide the organisational base for the exercise of the basic freedoms, the right to carry on trade, business and industrial operations, and the right to own and dispose of property, provide their economic base. Without such organisational and economic bases, the basic freedoms would be illusory; there would then be no parties, unions, associations, newspapers and no religious denominations or associations with sufficient means to create a free public opinion on any vital concern of individual or collective life.

22. The right to free speech and expression guaranteed under Article 19 (1) (a) is likely to be considerably whittled down by the principle enunciated in *Hamdard's case* ⁽¹¹⁾, in which it was laid down that the Right cannot be extended "where there is an element of trade or commerce". It must not be forgotten that under modern conditions most of the organised activities indispensable to the exercise of the basic freedoms through media of books, journals, newspapers, cinema, drama and the press, which owe their existence in some way or the other to trade or commerce, would cease to be protected if this principle stands accepted. The door would then be open to the Legislature to cripple the Right by imposing restrictions on the essential commercial activities connected with it.

23. The correct position in this matter would appear to be that if speech and expression *prima facie* attracts Article 19 (1) (a), protection should not be denied because it also falls under Article 19 (1) (g). In *Sakal Paper's case* ⁽¹²⁾, there has been considerable improvement on the position, at any rate so far as the press is concerned. However, it is difficult to see any distinction in principle between the

(11) *Hamdard Dawakhna v. Union of India*, (1960) 2 S.C.R. 671; A.I.R. 1960 S.C. 554.

(12) A. I. R. 1962 S.C. 305.



press and other media of expression, all of which have an element of trade or commerce.

24. Under the Constitution as amended, the right to property is available to the citizen only in a very attenuated form. Justice Douglas of the American Supreme Court, in his review of the Indian Constitution, summarises the position as follows :

"Whatever the cause, the 1955 Amendment casts a shadow over every private factory, plant, or other individual enterprise in India. The Legislature may now appropriate it at any price it desires, substantial or nominal. There is no review of the reasonableness of the amount of compensation. The result can be just compensation or confiscation—dependent wholly on the mood of the Parliament... :

If the Parliament appropriates private property for only nominal compensation, the spectre of confiscation would have entered into India contrary to the teachings of her outstanding jurists." (13)

25. Luckily, in *Kochuni v. States of Madras and Kerala* (14), the Supreme Court has held that the laws relating to deprivation of property must conform to Articles 31 and 19 (1) (f). In some respects, therefore, the restrictions on the right to property have come under judicial review, without which the basic freedoms are sure to wither away in course of time for want of economic nourishment.

V

"Reasonable Restrictions".

26. The rights guaranteed by the Sub-clauses of Article 19 (1) can be subjected to "reasonable restrictions" referred in clauses (2) to (6). This enables the Courts to strike a balance between the rights and permitted social control, (15) by exercising the power on the one hand to "play the role of the sentinel", and on the other, to accommodate the just claims of public interest to the paramountcy of the Fundamental Rights. Reasonableness, it is obvious, has in the first instance to be related to the right, that is to the necessity of maintaining it substantially unimpaired, except in extraordinary or emergent circumstances of a passing nature. As Mr. Justice Vivian Bose laid down, it is the "Rights" that are fundamental and not the restrictions.

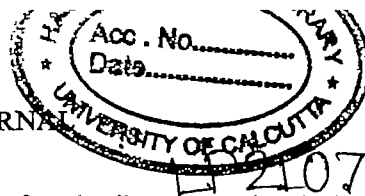
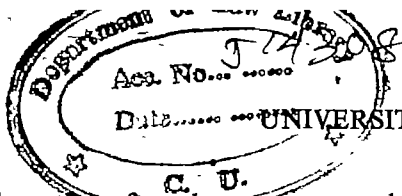
27. The test was specifically laid down in *State of Madras v. Row* (16), where it was held that for construing "reasonableness" under clauses (2) to (6), the nature of the right, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. The restriction on the guaranteed rights, according to the test so laid down, should be within the narrowest limits and "not to curtail a right like the freedom of association, in the absence of any emergent or extraordinary circumstances." (16)

(13) See William O. Douglas, *From Marshall to Mukherjee*, Studies in American and Indian Constitutional Law, Calcutta, 1956, 224.

(14) 1960 (3) S.C.R. 887; A.I.R. 1960 S.C. 1080.

(15) *Dwarka Prasad v. State of U.P.*, 1954 S.C.R. 803 ; A.I.R. 1954 S.C. 224.

(16) (16) *State of Madras v. V G. Row*, 1952 S.C.R. 597, 607; A.I.R. 1952 S.C. 196.



28. Soon thereafter, there was a trend in judicial decisions to reduce the importance of the right as guaranteed by the constitution and to give greater importance to public interest as envisaged by the Legislature. Reasonable restriction, it was laid down, must have a reasonable relation to the object which the Legislature seeks to achieve and must not go in excess of that object. ⁽¹⁷⁾

29. This trend soon gained momentum and the view of the Legislature in the main was accepted as the measure by which to judge the reasonableness of the restriction. Emphasis on the other elements, namely the necessity of maintaining the right substantially unimpaired, the extent and urgency of the evil sought to be remedied and the disproportion of the imposition, receded in the background.

30. The trend was further strengthened in **Hanif Quareshi's case**, where it was laid down that the restriction has to be determined in an objective manner and from the standpoint of the interests of the general public, and **not from the point of view of persons upon whom the restrictions are imposed or upon abstract considerations.** ⁽¹⁸⁾ (Italics mine). This principle, as it reads, would imply that the Courts, while assessing reasonableness, need not take into account how the restriction affects the right of the citizen concerned nor the broad constitutional grounds on which the paramountcy of the Fundamental Rights has to be maintained. This is a reversal of the express provisions of the Constitution.

31. The scope for discovering "the reasonableness of a law" was rendered limitless

when in **Krishna Sugar Mills** ⁽¹⁹⁾, it was held that the Court, in judging the reasonableness of a law, should necessarily see, not only the surrounding circumstances, but also the contemporaneous legislation passed as part of a single scheme. According to this test, reasonableness is not to be judged from the object which the impugned legislation seeks to achieve, but the Court must embark on a microscopic scrutiny of related legislations and notifications passed thereunder, to discover the unity or wisdom *ex post facto* to justify the restriction.

32. Mr. Justice Subba Rao, in a separate judgment, disapproved of this approach in unqualified terms: ⁽²⁰⁾

"But I am clear in my mind that the validity of an Act shall not be made to depend upon another Act unconnected with the impugned Act or power conferred thereunder, which might, if properly exercised, off-set the evil tendency or the vice of the impugned Act. If the validity of an Act is made to depend upon such a foundation, a superstructure will have been built on shifting sands. To do that is to destroy the stability of legislation and to introduce an uncertain element therein.

To go further and to depend upon a notification of a transitory nature issued under an unconnected Act is to place the statute in a fluid state. In such a situation its validity would

(17) *Chintamanrao v. State of M.P.*, 1952 S.C.R. 759; A.I.R. 1951 S.C. 118; *Arunachala v. State of Madras*, A.I.R. 1959 S.C. (303).

(18) 1959 S.C.R. 629; A.I.R. 1958 S.C. 731, 733, 744.

(19) *The Lord Krishna Sugar Mills v. Union of India*, 1960 (1) S.C.R. 39; A.I.R. 1959, S.C. 1124, at p. 1132.

(20) *Ibid*, p. 1137.

depend upon a statutory order of temporary duration; it would change colour with the changing attitudes of an authority empowered to issue the order. It would also mean that a Court will have to embark upon a roving search of all Acts and notifications which may, by design or accident, alleviate or mollify the evil consequences of an impugned Act."

33. This tendency reached its high watermark in **Narendra Kumar V. Union of India**⁽²¹⁾ in which the Supreme Court upheld the Non-Ferrous Metals Control Order, totally extinguishing the right to carry on business by a large group of intermediaries, on the ground that the restriction was "reasonable in the interests of the general public". As assumed by the Court, it would eliminate middle men's profit and thereby bring down prices—a proposition of questionable validity. If this is accepted, it would empower the State to bring in totalitarian millennium of universal State trading by notification, which by the way is rarely known to have brought down prices. The fact remains that the restriction has been construed as authorising "prohibition" or "extinction"; the "role of the sentinel" has been extended to putting the unfortunate victim out of existence altogether.

34. If this judicial trend is not arrested, most of the rights in Article 19 (1) would be placed at the mercy of the Legislature.

VI

Fundamental Rights and Directive Principles.

35. The Fundamental Rights are judicia-

ble; the Directive Principles are not. The Directive Principles are only intended to show the directions in which political, social and economic justice mentioned in the Preamble is to travel⁽²²⁾, but never so as to break through the barrier of Fundamental Rights. Any legislation implementing them has, therefore, to 'conform to and run as subsidiary to the Chapter of Fundamental Rights'.⁽²³⁾

36. Then a process of elevating the Directive Principles to the level of Fundamental Rights began. In the **Kerala Education Bill**⁽²⁴⁾, the principle of harmonious construction between Fundamental Rights and Directive Principles was accepted. That implies that the Fundamental Rights have to be read in the light of the Directive Principles.

37. Coming trends, like events, began to cast their shadows before. The dissenting judgment of Mr. Justice Das (as he then was) in **Subodh Gopal's case** may be mentioned here:—

"We cannot overlook that the avowed purpose of our Constitution is to set up a welfare state by **subordinating the social interest in individual liberty** or property to the larger social interest in the rights of the community".⁽²⁵⁾

When confronted with the express words of Article 31 (5) (b) (ii), Mr. Justice Das declined to circumscribe the limits of social control to be exercised by the State. The State was to be considered the final judge as to "when and how and to what extent the

(21) 1960 (2) S.C.R. 375; A.I.R. 1960 S.C. 430, 436.

(22) Vide Article 38.

(23) vide *The State of Madras v. Champakam Dorairajan*, A.I.R. 1951, S.C. 226, at p. 228. Also see *Hanif Quareshi's case*, A.I.R. 1958 S.C. 739.

(24) In re *Kerala Education Bill*, A.I.R. 1958 S.C. 956.

(25) A.I.R. 1954 S.C. 92 at 113.

social control should be exercised". (26)

38. Though Fundamental Rights are given priority in words, one can see a systematic trend towards Directive Principles gaining paramountcy. In more than one case they were allowed to override the Rights.

39. The Preamble aims at securing justice, political, social and economic, to the citizens, and to achieve it, it is laid down in Article 38 of the Directive Principles that the "State shall try to promote the welfare of the people". For promoting such welfare, the Legislature is naturally the most effective instrument. However, the Courts, in discharge of their high function, cannot depart from judicial detachment; they should realise that justice, political, social and economic, has many ways of fulfilling itself. Slogans like "social trends", "socialism" and "socialistic pattern of society" are based on varying economic theories; their connotations are difficult to define with judicial certainty and vary from one exponent to the other. "A constitution", to use the words of Justice Holmes, "is not intended to embody a particular economic theory, whether of paternalism.....or of *laissez faire*". But in India, according to some judgments, the firm foundation of guaranteed Fundamental Rights can be dislodged by currently accredited theories sponsored by the Legislature.

40. Where there are competing demands of social control allegedly exercised for the welfare of the people and of liberty, there should be reasonable accommodation between them, it is true, but it is the function of the

Courts to see that such accommodation does not imply surrendering the liberty of the individual.

VII

Equality of Status and of Opportunity.

41. The other basic freedom contained in the Preamble is Equality of Status and of Opportunity. To secure this objective, Article 14 guarantees equality before law and equal protection of the laws within the territory of India. This clause is absolute in terms. Our Supreme Court, following the decisions of the U. S. Supreme Court, has laid down that "while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation....What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration". (27)

42. This principle of constitutionality, first enunciated in *Chiranjitlal's case* (28), is wholesome, but in actual application it is difficult to recognise its limits. Any conceivable state of facts is held to provide a nexus between the classification and the object of the Act ascertained from as wide a field as ingenuity can permit. (vide *Krishna Sugar Mills' case*. (29))

43. Classification has been upheld on grounds, geographical, social and even historical, in terms of size or time. This has discharged the State from the duty of making an honest and serious attempt at just and reasonable classification in providing for differential treatments to persons, areas or

(26) Ibid.

(27) *Budhan Choudhry v. State of Bihar*, 1955 (1) S. C. R. 1045, 1048; A. I. R. 1955 S. C. 191, 193.

(28) 1950 S. C. R. 869.

(29) 1960 (1) S. C. R. 39; A.I.R. 1959 S.C. 1124.

subject matter. To that extent the State has been relieved from scrupulously conforming to Article 14 in its law making.

• 44. In *Pannalal's case* ⁽³⁰⁾, the constitutionality was presumed by looking at the Preamble of the predecessor of the Income-tax Act in question which only recited that "its object was the collection of income-tax" ! The presumption that a power is not susceptible of abuse has been drawn by the circumstance that the power to transfer cases is reposed in high authorities. In *K. L. Arora's case* ⁽³¹⁾, even the subjective opinion of an executive authority was held good enough.

45. Article 14 in the law as it stands at present, practically affords no protection.

VIII

Restrictions on Article 32.

46. Recently serious inroads have been made in the scope and efficacy of Article 32. I may be forgiven for quoting from my note which I submitted to the Sub-Committee on the Fundamental Rights early in 1947, when I first pressed for a remedy being made into a Fundamental Right :

"12. If the Writs in the Constitution are not provided, people will have to subject themselves to the loss of valuable rights before the constitutionality of the act of a government is tested in a suit, which might take years to be finally decided. It is also of the highest importance that the question

whether a law is valid or not must be decided at the earliest moment. Any uncertainty about its validity will lead to great hardships. The object of the Fundamental law will be frustrated if people have to serve sentences, pay fines or deny themselves the privileges given by the Constitution for a long time under an invalid law." ⁽³²⁾

47. Our Constitution is a fundamental and paramount law of the nation. Of it, Chapter III, which forms a complete code in itself, is the most sacrosanct. There can be no higher public policy than the one embodied in it.

48. Of the Fundamental Rights contained in Chapter III, the Fundamental Right given to the citizen to directly approach the highest court in the land is unique in so far as it has no place in other constitutions. Dr. Ambedkar, in the course of the debate on the corresponding provision in an earlier draft, said as follows :

"Now, Sir, I am very glad that the majority of those who spoke on this article have realised the importance and the significance of this article. If I was asked to name any particular article in this Constitution as the most important—an article without which this Constitution would be a nullity—I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance." ⁽³³⁾

49. In *Daryao v. State of U. P.* ⁽³⁴⁾, the

(30) 1957 S. C. R. 233 ; A. I. R. 1957 S. C. 391.

(31) 1961 (3) S. C. R. 135.

(32) Document CAF No. 3 in Munshi Collection of Constitutional Papers. (Bharatiya Vidya Bhavan).

(33) Constituent Assembly Debates of 9. 12. 1948, p. 953.

(34) (1962) S. C. J. 702.

Supreme Court held that the general rule of *res judicata* is founded on and embodies principles of public policy and so, is an essential part of the Rule of Law; that the binding character of judgments pronounced by Courts of competent jurisdiction is an essential part of the Rule of Law, which obviously is the basis of the administration of justice on which the Constitution lays so much emphasis; and that therefore a person who had recourse to the High Court under Article 226 cannot have direct access to the Supreme Court under Article 32, if the matter is decided on merits.

50. The Court evidently was led to this conclusion relying on English precedents, which, for want of a fundamental and paramount law, are known to draw upon public policy as part of the country's law, though according to a dictum endorsed by Lord Halsbury, "it should not be relied upon to prevent a party from availing himself of an indisputable principle of law in a court of justice".⁽³⁵⁾ Lord Atkin also, in *Fender v. St. John—Mildmay*,⁽³⁶⁾ laid down that "public policy should only be invoked in clear cases in which the harm to the public is substantially—incontestable". It is, therefore, open to doubt whether judicial opinion in England would have fared forth on this "unruly horse"—as Hobart C. J. picturesquely calls public policy—to chop a limb off an express constitutional guarantee so helpful to the citizen.

51. Resort to American authorities in this behalf is, it is submitted, of little assistance, for the right to approach the Supreme Court in U. S. A. directly is not a guaranteed

right under its fundamental law. The Supreme Court of U. S. A. is very zealous of maintaining guaranteed rights, and in a recent case went to the length of striking down a law imposing 4.00 fees, on a *habeas corpus* petition. It held that "there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has".⁽³⁷⁾ By the way, I may mention that in India, a petitioner claiming guaranteed rights under Article 32, has to be rich enough to pay Rs. 2500/- before he can get his rights vindicated.

52. Further, there is no specific authority that the binding character of judgments is an integral feature of the Rule of Law; the world jurists are still struggling to define its implications with some sort of precision. In fact, in India, the Rule of Law is enshrined in the Constitution itself; there can therefore, be no public policy nor any Rule of Law which could bar a citizen from availing himself of a Fundamental Right in the nature of a remedy expressly guaranteed in Part III, which is a complete code in itself.

53. Another case which has made a more serious encroachment upon Article 32 is *Ujjam Bai's case*⁽³⁸⁾, where it was held that an order of assessment made by a competent authority under taxation—statute, which is *intra vires*, cannot be called in question on a petition under Article 32, even if the order is violative of a Fundamental Right, unless it offends the rules of natural justice.

54. As I understand the decision, an assessee, against whom an order of the nature referred to and which is violative of the Fundamental Right has been made, must first

(35) *Janson v. Drifontein Consolidated Mines*, (1902) A.C. 484.

(36) L.R. 1938, A.C. 1.

(37) *Smith v. Bennett*, U.S. Reports, 6 L ed. 2d. p. 40.

(38) and (38-a) Unreported Petition No. 79 of 1959, decided on April 10, 1962.

suffer the disadvantage of paying or securing the assessment; go through all the appellate processes prescribed by the Sales-tax Act to secure departmental relief; pass through the portals of the High Court under Article 226—and then only approach the Supreme Court to vindicate what would have been his Fundamental Right had it not been restricted by this decision—if he lives long enough and is not enough and is not “broke” in the meantime!

55. I cannot state my view better than in the clear words in the dissenting judgment of Mr. Justice Subba Rao : ^(38a)

“It must be borne in mind that our Constitution in effect promises to usher in a welfare State for our country; and in such a state the Legislature has necessarily to create innumerable administrative tribunals, and entrust them with multifarious functions. They will have powers to interfere with every aspect of human activity. If their existence is necessary for the progress of our country, the abuse of power by them may bring about an authoritarian or totalitarian state. The existence of the aforesaid power in this Court and the exercise of the same effectively when the occasion arises is a necessary safeguard against the abuse of the power by the administrative tribunals.

In *Romesh Thappar v. State of Madras* (4), this Court declared that under the Constitution the Supreme Court is constituted as the protector and guarantor of fundamental rights, and

it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights, although such applications are made to the Court in the first instance without resort to a High Court having concurrent jurisdiction in the matter.”

(4)—1950 S. C. R. 594.¹

In this case an attempt was made on behalf of the State to restrict the Fundamental Rights under Article 32 in certain matters of taxation, and it succeeded!

IX

CONCLUSION

56. Before closing my remarks, I may be permitted to strike a personal note, particularly as I happen to be the survivor of the small group in the Constituent Assembly who, from the first day and day after day, saw phrase by phrase, Article by Article taking shape in the Constitution, with loving tenderness.

57. Our Constitution is reckoned as one of the most remarkable of modern Constitutions, giving stability and unity to a nation newly emerged in freedom, yet flexible enough to enable a welfare State to be built on the firm foundations of basic freedoms. The lawyers of this generation, both on the Bench and at the Bar, have, therefore, a duty to pass on the basic freedoms to posterity in their undiminished plenitude. If, however, the trends which I have mentioned are not halted or reversed in their cumulative effect, history will not acquit us of failing to carry out our sacred trust.

Workmen's Compensation : Half Century of Judicial Developments

BY
SAMUEL B. HOROVITZ

(6) *Incidents of Work*

No one denies that an injury which results from the main work for which the employee is hired is compensable. But suppose the injury "arises out of" something secondary or incidental to his work, such as going to the toilet, eating, or getting fresh air.

These acts of personal ministration¹¹⁶ are universally recognized as compensable incidents of the employment. Getting fresh air,¹¹⁷ smoking,¹¹⁸ resting,¹¹⁹ eating food or ice cream,¹²⁰ quenching thirst, whether by water, soft drinks, coffee, beer or wine,¹²¹ taking

116 See list of cases in Horovitz, *The Litigious Phrase: "Arising out of" Employment*, 3 NACCA L. J. 15, 60-63 (1949).

117 Von Ette's Case, 223 Mass. 56, 111 N. E. 696 (1916); Moschinger v. Henry Heide, Inc., 256 App. Div. 1019, 10 N. Y. S. 2d 406 (3d Dep't 1939).

118 Natco Corp. v. Mallory, 262 Ala. 595, 80 So. 2d 274 (1955) (retrieving package of cigarettes, arm caught in revolving gear, slight deviation no bar); Tinsman Mfg. Co. v. Sparks, 211 Ark. 554, 201 S. W. 2d 573 (1947) (purchasing smoking tobacco); Puffin v. General Elec. Co., 132 Conn. 279, 43 A. 2d 746 (1945) (includes setting one's self accidentally on fire—sweater ignited by spark, in smoking room); Columbia Cas. Co. v. Parham, 69 Ga. App. 258, 25 S. E. 2d 147 (1943) (includes injury attempting to throw away cigarette while on elevator); Dzikowsky v. Superior Steel Co., 259 Pa. 578, 103 Atl. 351 (1918) (oil-soaked apron caught fire); Mack v. Branch No. 12, Etc., 207 S.C. 258, 35 S.E. 2d 838 (1945); McLaughlin v. Anderson, 4 B. W. C. C. 376 (1911) (fell under wagon wheels trying to recover pipe).

119 Sullivan's Case, 241 Mass. 9, 134 N. E. 406 (1922) (fell through glass window in rest room); Kubera's Case, 320 Mass. 419, 69 N. E. 2d 673 (1964) (resting on door step of laundry when injured); Spencer v. Chesapeake Paperboard Co., 186 Md. 522, 47 A. 2d 385 (1946) (sleeping as part of resting).

120 DeStefano v. Alpha Lunch Co., 308 Mass. 38, 30 N. E. 2d 827 (1941) (food); Sebek v. Cleveland Graphite Bronze Co., 148 Ohio 693, 76 N. E. 2d 892 (1947) (ptomaine poisoning from food in plant cafeteria); Vilter Mfg. Co. v. Jahncke, 192 Wis. 362, 212 N. W. 641 (1927) ("eating ice cream" like "drink of water").

121 Osterbrink's Case, 229 Mass. 407, 118 N. E. 657 (1918) (mistook poison for water); Wells v. Morris, 33 Ala. App. 497, 35 So. 2d 54 (1948), 3 NACCA L. J. 102 (1949)

a bath or shower away from home, whether or not provided by the employer,¹²² using a telephone¹²³ or a toilet¹²⁴ and washing and pressing working clothes¹²⁵ and have been upheld as compensable "incidents" of the employment.

Similarly, the employer can make other things "incidents" of employment by contract, custom or otherwise.¹²⁶ Hence supplying transportation,¹²⁷ providing recreation such as

(making coffee, explosion—injuries compensable); *Goodyear Aircraft Corp. v. Industrial Comm'n*, 62 Ariz. 398, 158 P. 2d 511 (1945) (bottle of cola burst); *Elliott v. Industrial Acc. Comm'n*, 21 Cal. 2d 281, 131 P. 2d 521 (1942) (poison mistaken for wine needed for indisposition); *St. Alexandre v. Texas Co.*, 28 So. 2d 385 (La. App. 1946) (cut hand cola bottle); *Martin v. J. Lovibond & Sons*, [1914] 2 K. B. 227 (draymen in streets all day, knocked down after getting beer in public house—no definite interval for meals); *Davidson v. Mould*, 69 Commw. L. R. 96 (Austl. 1944) (opened cola bottle on employer's advice, blinded eye).

122 *Miller v. F. A. Bartlett Tree Expert Co.*, 3 N. Y. 2d 654, 148 N. E. 2d 296, 171 N. Y. S. 2d 77 (1958) (conference on tree surgery ended, felt "pretty grubby" after digging moss—returned to hotel, slipped in bathtub taking shower—compensable). *Divelbiss v. Industrial Comm'n*, 140, Colo. 451, 344 P. 2d 1084 (1959) (showering after work—facilities furnished by employer—compensable), *overruling Industrial Comm'n v. Rocky Mountain Fuel Co.*, 107 Colo. 226, 110 P. 2d 654 (1941) (as "out of harmony with the present trend of cases"); cases discussed in Note, 32 Rocky Mt. L. REV. 257 (1960).

123 *Cox's Case*, 225 Mass. 220, 114 N. E. 281 (1916) (went to answer telephone); *Holland-St. Louis Sugar Co. v. Shraluka*, 64 Ind. App. 545, 116 N. E. 330 (1917) (answering telephone of unknown location, slipped on stairway).

124 *Haskin's Case*, 261 Mass. 436, 158 N. E. 845 (1927) (used bridge over river as toilet, drowned—no toilets in vicinity); *Sachleben v. Gjellefald Constr. Co.*, 228 Iowa 152, 290 N. W. 48 (1940) (sudden need for moving bowels, hid between trains which then moved—compensable); *Zabriskie v. Erie R. R.*, 86 N. J. L. 266, 92 Atl. 385 (Ct. Err. & App. 1914) (crossing street to employer's building containing the toilets).

125 *Sylvia's Case*, 298 Mass. 27, 9 N. E. 2d 412 (1937).

126 *Donovan's Case*, 217 Mass. 76, 104 N. E. 431 (1914) (transportation is contractual incident); *Stony-Brady, Inc. v. Heim*, 152 Fla. 710, 12 So. 2d 888 (1943) ("or otherwise"—restaurant manager volunteered to remove "crick" in waitress's neck, injured her spinal column—arose out of employment); *DeSautel v. North Dakota Workmen's Comp. Bureau*, 75 N. D. 405, 28 N. W. 2d 378 (1947) (custom, conduct of parties, may create new incidents); *Portee v. South Carolina State Hosp.*, 234 S. C. 50, 106 S. E. 2d 670 (1959), 23 NACCA L. J. 167 (1959) (co-worker at hospital administers penicillin to hospital attendant—dies of shock—incident of employment, despite negligence and disobedience of rules).

127 See note 126 *supra*. For discussion of exceptions to going and coming rule, see notes 204-10 *infra*.

allowing sports to be played on the premises¹²⁸ or subsidizing soft ball, bowling, or other teams to compete with rivals,¹²⁹ whether by day or night, may be considered "incidents" of the employment; and injuries during such transportation or play have been held to "arise out of" the employment and thus are compensable.

Any reasonable incident of the employment, properly proved, may be the basis of compensation liability; it is not limited to personal administrations or employee games. Christmas parties and outings,¹³⁰ and the use of hotel rooms¹³¹ have been held to be compensable incidents of the employment. But the link to the work must be established by evidence and not by surmise.

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- 128 *University of Denver v. Nemeth*, 127 Colo. 385, 257 P. 2d 423 (1953), 12 NACCA L. J. 79 (1953) (spring football practice held incident of student's employment); *Geary v. Anaconda Mining Co.*, 120 Mont. 485, 188 P. 2d 185 (1947) (handball during lunch); *Tocci v. Tessler & Weiss, Inc.*, 28 N. J. 582, 147 A. 2d 783 (1959), 23 NACCA L. J. 147 (1959) (hurt during customary lunch-hour softball game); *Brown v. United Servs. for Air*, 273 App. Div. 932, 78 N.Y.S. 2d 37 (3d Dep't 1948), *aff'd*, 298 N.Y. 901, 84 N.E. 2d 810 (1949) (volleyball on premises during lunch hour); *Clancy v. Department of Pub. Health*, [1959] W.C.R. 49 (New South Wales) (compensation awarded to a male nurse at a mental hospital injured in after-hours soccer games on the hospital field—patients were encouraged to watch); *Schneider, Compensability of Injuries During Employer-Sponsored Recreation*, 2 NACCA L.J. 62 (1948).
- 129 *Turner v. Willard*, 154 F. Supp. 352 (S.D.N.Y. 1956) (bowling league captain injured on trip to see bowling league president during working hours—no deviation or abandonment of employment—workmen's compensation not confined by common law concepts of employment); *Jewell Tea Co. v. Industrial Comm'n*, 6 Ill. 2d 304, 128 N. E. 2d 699 (1955) (intra-company baseball league, injured sliding into third base—esprit de corps among employees as benefit to employer); *Complitano v. Steel & Alloy Tank Co.*, 34 N. J. 300, 168 A. 2d 809 (1961) (softball after hours, employer paid for uniforms, denial of compensation reversed); *Tedesco v. General Elec. Co.*, 305 N. Y. 544, 114 N. E. 2d 33 (1953), 14 NACCA L. J. 65 (1954) (despite incorporation of team, ball game subsidized by employer—denial of compensation reversed); *Ott v. Industrial Comm'n*, 83 Ohio App. 13, 82 N. E. 2d 137 (1948) (heart attack during baseball game sponsored by employer—compensable).
- 130 *Noble v. Zimmerman*, 237 Ind. 556, 146 N. E. 2d 828 (1957), 21 NACCA L. J. 176 (1958) (recreational outing to encourage attendance at business meeting, racing-dive in lake near employer's cottage, fractured cervical vertebra without contacting anything—compensable); *Moore's Case*, 330 Mass. 1, 110 N. E. 2d 764 (1953), 12 NACCA L. J. 77 (1953) (dancing at annual Christmas party—fractured coccyx "jitterbugging"—blanket denial of compensation reversed, remanded); *Graves v. Central Elec. Power*

(7) *Slight Deviation and Curiosity as Incidents of Work*

At common law the defenses of deviation and curiosity may have had some validity. Using narrow common-law reasoning, many early courts denied workers compensation recovery on mere proof that the minor deviation¹³² played some part in the injury, or that curiosity¹³³ was one of the factors causing the injury.

Modern courts no longer follow these rules. Slight deviation is not a defense under most decisions.¹³⁴ Thus a slight deviation to get a chew of tobacco,¹³⁵ or to ask a fellow

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- Co-op, 306 S. W. 2d 500 (Mo. 1957), 21 NACCA L. J. 177 (1958) (employee drowned in attempt to rescue own son at company-sponsored picnic—stand-by duty concurrently—compensable); *Torres v. Triangle Handbag Mfg. Co.*, 13 App. Div. 559, 211 N. Y. S. 2d 992 [3d Dep't 1961] [drinking at boss's Christmas party, jealous, stabbed co-employee—compensable].
- 131 *Wiseman v. Industrial Acc. Comm'n*, 46 Cal. 570, 297 P.2d 649 [1956] [commercial traveler at hotel, asphyxiated in fire—immaterial that he had overnight guest [female] for an immoral or unlawful purpose shelter was an incident of his employment]; See also cases cited note 221 *infra*.
- 132 *Horton's Case*, 275 Mass. 572, 176 N. E. 648 [1931] [deviated from toilet route to pick up a newspaper] [This early case would probably not be followed today in Massachusetts—author]. *Contra*, *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S. W. 2d 573 [1947] [refusing to follow early Massachusetts and Indiana "slight deviation" cases, as they were against the modern trend].
- 133 *Maronofsky's Case*, 234 Mass. 343, 125 N. E. 565 [1920]; but see *Bethlehem Steel Co. v. Parker*, 64 F. Supp. 615 [D. Md. 1946] [refused to follow *Maronofsky's Case*, *supra*].
- 134 *Natco Corp. v. Mallory*, 262 Ala. 595, 80 So. 2d 274 [1955] [retrieving package of cigarettes, arm caught in revolving gear, slight deviation no bar]; *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S. W. 2d 573 [1947]; *Western Pipe & Steel Co. v. Industrial Acc. Comm'n*, 49 Cal. App. 2d 108, 121 P. 2d 35 [1st Div. 1942]; *Bernier v. Greenville Mills*, 93 N. H. 165, 37 A. 2d 5 [1944]; *Secor v. Penn Serv. Garage*, 19 N. J. 315, 117 A. 2d 12 [1955], *affirming* 35 N. J. Super. 59, 113 A. 2d 177 [Super. Ct. 1955] [garage attendant momentarily and impulsively deviated from work to stroke match, perhaps in mock bravado—gasoline-soaked clothes ignited—akin to curiosity and horseplay cases—compensable]; *Miller v. C. F. Mueller Co.*, 132 N. J. L. 540, 41 A. 2d 402 [Sup. Ct. 1945] [deviated to help fellow worker on a machine]; *Frank v. Allen*, 270 App. Div. 960, 61 N. Y. S. 2d 728 [3d Dep't 1946]; *Wickhan v. Glenside Woolen Mills*, 252 N. Y. 11, 168 N. E. 446 [1929]; *Corlett v. Lancashire Ry.*, 11 B. W. C. C. 293, 18 N. C. C. A. 1043 [1918].
- 135 *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S. W. 2d 573 [1947] [crossing street to purchase smoking tobacco, hit by automobile]; *Western Pipe & Steel Co. v. Industrial*

worker the time^{T36} or to throw away or retrieve cigarettes^{T37} is harmless; and awards are upheld even when the injury occurred during the deviation.

Deviations for traveling employees have caused judicial upheavals.^{T38} Most courts will award compensation where the deviation is cured by a return to the main or permissible route,^{T39} or where the employee, after the personal trip is over but before the main business route is regained, is proceeding in the direction of his business destination.^{T40} Minor or in-

Acc. Comm'n, 49 Cal. App. 2d 108, 121 P. 2d 35 [1st Div. 1942] [slight deviation to get cigarettes during lunch hour].

136 Corlett v. Lancashire Ry., 11 B. W. C. C. 293, 18 N. C. C. A. 1043 [1918].

137 Natco Corp. v. Mallory, 262 Ala. 595, 80 So. 2d 274 [1955]; Columbia Cas. Co. v. Parham, 69 Ga. App. 258, 25 S. E. 2d 147 [1943] [caught arm in elevator while throwing away his cigarette—employment at least “a contributing cause”].

138 1 LARSON, WORKMEN'S COMPENSATION § 19 [1960] [deviations, with multiple diagrams, to try to explain the varying court decisions].

139 Ohmen v. Adams Bros., 109 Conn. 378, 146 Atl. 825 [1929] [voted, then regained main highway between his home and work]; Allison v. Brown & Horsch Insulation Co., 98 N. H. 434, 102 A. 2d 493 [1954] [cured by the return to the usually travelled route]; Neville v. Arthur Anderson Co., 284 App. Div. 994, 135 N. Y. S. 2d 349 [3d Dep't 1954] [personal side trip completed].

140 London Guar. & Acc. Co. v. Herndon, 81 Ga. App. 178, 181, 58 S. E. 2d 510, 512 [1950] (“[H]e again resumed the duties of his employment.”); accord, Federal Mut. Liab. Ins. Co. v. Industrial Acc. Comm'n, 94 Cal. App. 251, 270 Pac. 992 [2d Div. 1928] [personal business over, he headed for business destination by alternate direct route—employee had broad latitude as to hours of work]; Stratton v. Interstate Fruit Co., 47 S. D. 452, 199 N. W. 117 [1924] [though “he may have deviated to some extent from the strict line of duty,”—driving employer's truck, danger of being struck by a streetcar was “incident to such employment”]. *Contra*, Public Serv. Co. v. Industrial Comm'n, 395 Ill. 238, 69 N. E. 2d 875 [1946] [killed on railroad crossing, headed for storage garage, but after deviating to own home—compensation denied]; Warren v. Globe Indem. Co., 217 La. 142, 46 So. 2d 66 [1950] [back in business direction, but also taking girl companion home]; Luke v. St. Paul Mercury Indem. Co., 140 Neb. 557, 300 N. W. 577 [1941] [Y. M. C. A. general secretary attended brother's funeral in Montana and headed for conference in Colorado—denied, despite employer's permission to attend funeral].

The *contra* cases are unusually harsh—and unless proof establishes that the new road created an increased risk, in violation of orders, the injury should be held to “arise out of” the employment as a risk of driving, without technical discussions of serious versus

substantial route deviation is usually no defense.¹⁴¹ A deviation by the driver of a vehicle is not to be charged against passengers,¹⁴² whether the driver is a superior or a fellow-employee.

The subject of curiosity is closely akin to that of slight deviation, and to some extent to horseplay. A slight deviation to get a cigarette or to take time out from work for various temporary purposes is not a bar to compensation. By the same token a minor deviation induced by curiosity is no bar.

Employees are not only careless, awkward and full of frailties ; but they bring with them to their jobs their prankishness, and their bad habits as well as their good ones. They smoke, drink sodas, chat and waste time. They also have a bent for putting parts of their anatomy in contact with machines, openings, and temporarily closed spots. But employees are not mere automatons and cannot be held to definite patterns like a machine.¹⁴³ The workmen's compensation acts were intended to protect them for any accident reasonably related to the employment.

slight deviations. See *Spradling v. International Shoe Co.*, 364 Mo. 938, 270 S. W. 2d 28 [1954], 15 NACCA L. J. 77 [1955] [salesman headed for Springfield fifteen or twenty miles outside of his territory to pick up wife—never reached her as killed in automobile collision ten miles from Springfield. His death here was not the result of an "added peril"—considered "slight deviation" in choice of routes as not to affect the applicability of the Workmen's Compensation Law].

141 *Spradling v. International Shoe Co.*, 364 Mo. 938, 270 S. W. 2d 28 [1954], 15 NACCA L. J. 77 [1955] ; *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S. W. 2d 573 [1947] ; *Western Pipe Co. v. Industrial Acc. Comm'n*, 49 Cal. App. 2d 108, 121 P. 2d 35 [1942] [running across street to buy food, in the course of a delivery trip] ; *Martin v. J. Lovibond & Sons*, [1914] 2 K. B. 227 [leaving delivery conveyance to have a glass of beer at two o'clock in the afternoon].

142 *Allison v. Brown & Horsch Insulation Co.*, 98 N. H. 434, 102 A. 2d 493 [1954] [employees were not drivers and need not protest a deviation by a superior ; also deviation here cured by return to usual traveled route] ; *Soden v. Public Serv. Transp. Co.*, 4 N. J. Misc. 817, 134 Atl. 560 [Sup. Ct. 1926], *aff'd by equally divided court*, 103 N. J. L. 713, 137 Atl. 437 [Ct. Err. & App. 1927] ["passive occupants of car," driver a fellow-employee, deviated to visit scene of an accident] ; *Texas Employers Ins. Ass'n, v. Chitwood*, 199 S. W. 2d 806 [Tex. Civ. App. 1946] [need not protest against deviation].

143 "Human beings, unlike machines, do not run in groves....." Horowitz, *The Litigious Phrase : "Arising out of" Employment*, 4 NACCA L. J. 19 [1949]. *Conyers v. Krey Packing Co.*, 194 S. W. 2d 749, 752 [Mo. Ct. App. 1946] ["An employee is not to be regarded as an automaton....."].

Hence most modern courts protect workers against their own follies where they fall short of wilful misconduct or deliberate self injury. The great weight of authority currently holds that injuries received during slight deviations to satisfy curiosity are compensable¹⁴⁴ no matter what form the curiosity may take, so long as it is what reasonably may occur to workers on the job in question and it is impulsive, thoughtless, or momentary. Thus awards have been allowed where the curiosity has taken the form of sticking one's head in an opening,¹⁴⁵ finger-testing a revolving blade¹⁴⁶ or opening a glove compartment and accidentally exploding a bomb.¹⁴⁷ But a deliberate, extensive excursion resulting in substantial abandonment of the employee's work may result in the denial of an award.¹⁴⁸

(8) *Violation of Rules or Laws*

The attempt to deny compensation because the employee was going faster than the speed

144 *Bethlehem Steel Co. v. Parker*, 64 F. Supp. 615 [D. Md. 1946]; *Bernier v. Greenville Mills*, 93 N. H. 165, 37 A. 2d 5 [1944]; *Franck v. Allen*, 270 App. Div. 960, 61 N. Y. S. 2d 728 [3d Dep't 1946]; *Jordan v. Dixie Chevrolet, Inc.*, 218 S. C. 73, 61 S. E. 2d 654 [1950]. See also *Boyd v. Florida Mattress Factory, Inc.*, 128 So. 2d 881 [Fla. 1961] [without rhyme or reason, threw firecracker under dock, blinded eye—such “insignificant antics should not be magnified into a constructive abandonment of employment”—denial of award reversed]. *Derby v. International Salt Co.*, 233 App. Div. 15, 251 N. Y. Supp. 531 [3rd Dep't 1931] [out of curiosity picked up a little box on floor—dynamite cartridges “It seems to be generally accepted today that employees are likely to explore during their spare time, and this may be fairly regarded as a part of the daily routine of work.....” MALONE, ACCIDENT'S PROMOTED BY EMPLOYEE'S CURIOSITY, in LOUISIANA WORKMEN'S COMPENSATION 217 [1951].

145 *Bethlehem Steel Co. v. Parker*, 64 F. Supp. 615 [D. Md. 1946].

146 *Bernier v. Greenville Mills*, 93 N. H. 165, 37 A. 2d 5 [1944].

147 *Jordan v. Dixie Chevrolet, Inc.*, 218 S. C. 73, 61 S. E. 2d 654 [1950]; *accord*, *Franck v. Allen*, 270 App. Div. 960, 61 N. Y. S. 2d 728 [3d Dep't 1946] [found dynamite cap sweeping floor, picked up nail and prodded, cap exploded].

148 *Simon v. Standard Oil Co.*, 150 Neb. 799, 36 N. W. 2d 102 [1949] [after his own work finished, went from his wash room to the paint room, where new exhaust fan had been installed, thirty feet away, considered serious deviation—strong dissent by Carter, J.]; *accord*, *Robertson v. Express Container Corp.*, 13 N. J. 342, 99 A. 2d 649 [1953] [deliberate excursion to roof ladder, fell through glass section—three dissents]; “[Account] ought to be taken of the ordinary habits and modes of conduct of workers in the intervals of inactivity in the course and place of their daily tasks.” Pound, 13 NACCA L. J. 61 (1954).

limit when he was injured (violation of law),¹⁴⁹ or because the employee was injured while carrying stones by tractor after his employer had told him to use his hands (violation of an order or rule),¹⁵⁰ has failed to impress the courts.

As long as the worker is doing what he is hired to do, the fact that he uses the wrong method¹⁵¹ or violates some law¹⁵² will not deprive him of his compensation rights. The only defenses given by most acts are "serious and wilful misconduct," deliberate self injury and "intoxication"; short of these, the court will not read "violation of rules" and "violation

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- 149 Day v. Gold Star Dairy, 307 Mich. 383, 12 N. W. 2d 5 (1943) (truck driver going uphill at forty-seven miles per hour on wrong side of road, hit by oncoming automobile—award stands, found guilty in criminal court).
 - 150 Ricci v. Katz, 267 App. Div. 928, 46 N. Y. S. 2d 781, 782 (3d Dep't 1944) "The use of the tractor was but an incident in the principal job of removing and carting away the stones. Claimant performed his work in a forbidden manner, rather than performing work which had been forbidden."
 - 151 Blair & Co. v. Chilton, 8 B. W. C. C. 324 (1915) (told to use safe platform and not to sit while turning wheel—workman acting within sphere of employment, though doing work in wrong way); Dravo Corp. v. Strosnider, 43 Del. 256, 45 A. 2d 542 (1945) (over 400) rules printed, violated one about riding on truck he was pushing—dead letter paper rule no bar); Prentice v. Twin City Wholesale Grocery, 202 Minn. 455, 278 N. W. 895 (1938) (forbidden to ride on conveyor, yet did so to facilitate his work, injured hand—doing one's work in wrong manner not a bar); Oklahoma Ry. v. Cannon, 198 Okla. 65, 176 P. 2d 482 (1946) (violation as to manner of performing work i.e., safety regulations, not fatal).
 - 152 Philbrick Ambulance Serv. v. Buff, 73 So. 2d 273 (Fla. 1954). (ambulance driver went through red light at thirty miles per hour, in violation of law); Wiseman v. Industrial Acc. Comm'n, 46 Cal. 2d 570, 297 P. 2d 649 (1956) [fire in hotel, female unlawfully with employee [bank official]—the risk of fire was in no way increased]; Webb v. Johnson, 195 Md. 587, 599, 74 A. 2d 7, 12 [1950] [private pilot had no license to take passengers, but did so, killed—compensable. "There appears to be nothing in the compensation statutes to bar an employee from recovery because he violates a statute."]; Chaffee v. Effron, 1 App. Div. 2d 197, 149 N. Y. S. 2d 115 [3d Dep't 1956] [drove employer's car around curve at illegal speed, over center line, killed in collision with a truck—compensable]; M & K Corp. v. Industrial Comm'n, 112 Utah 488, 189 P. 2d 132 [1948] [a leading case—father was killed when unlicensed son [violation of law] drove truck—no bar went only to the manner of doing the work]; Fliteways v. Industrial Comm'n, 249 Wis. 496, 24 N. W. 2d 900 [1946] [illegal "buzzing"]].
 - 153 Vaz's Case, 174 N. E. 2d 360 [Mass. 1961] [employee, stuck in elevator, climbed out of window and was hurt—rule against using elevator was not enforced—not quasi criminal,

of laws" into the acts.⁽¹⁵³⁾ In fact, most of these violations result from mere negligence⁽¹⁵⁴⁾ or thoughtlessness,⁽¹⁵⁵⁾ neither of which are defenses.

(9) *Suicide*

Originally the cases required the dependents of a suicide to prove that the suicide was due to (1) an uncontrollable impulse, or alternatively, (2) a delirium so strong that the deceased did not realize that he was ending his life.⁽¹⁵⁶⁾ His insane "choice" to die was regarded as voluntary and wilful, and breaking the chain of causation.⁽¹⁵⁷⁾ This requirement was erroneously imported from tort law⁽¹⁵⁸⁾ and read into workmen's compensation statutes in the days when courts brought back fault in disguised garb.⁽¹⁵⁹⁾ The Massachusetts rule, based on the tort law, was finally changed by statute.⁽¹⁶⁰⁾ The current weight of authority has now dropped the second requirement—that the deceased be unaware that he is ending his

so not serious and wilful misconduct]; *Carey v. Bryan & Rollins*, 49 Del. 387, 117 A. 2d 240 [1955] [sixty-five mile speed and lightin³ cigarette, ran into pole—not even "wilful failure" to perform a duty required by statute], 17 NACCA L. J. 63 [1956]; *Newell v. Moreau*, 94 N. H. 439, A. 2d 476 [1947].

154 *Corrina v. De Barbier*, 247 N. Y. 357, 160 N. E. 397 [1928] [fell asleep on wagon on ferry in disobedience of orders; mere negligence and no bar to recovery]; *Shute's Case*, 290 Mass. 393, 195 N. E. 354 [1935] [distributing circulars in seventeen degrees below zero weather—failed to wear mittens, froze hands—mere negligence, no bar]; *Chaffee v. Effron*, 1 App. Div. 2d 197, 149 N. Y. S. 2d 115 [3d Dep't 1956] [excessive speed around curve—mere negligence].

155 *Thompson v. State Compensation Comm'r*, 133 W. Va. 95, 54 S. D. 2d 13 [1949] [act done impulsively and spontaneously].

156 *Sponatski's Case*, 220 Mass. 526, 108 N. E. 466 [1915] [Molten lead in eye, uncontrollable impulse, jumped through window, did not realize the nature of his act].

157 *Ruschetti's Case*, 299 Mass. 425, 13 N. E. 2d 34 [1938] [chain of causation is broken by the voluntary though insane choice of the injured person to die—the employee's arm was amputated, very painful, hanged self]; *Barber v. Industrial Comm'n*, 241 Wis. 462, 466, 6 N. W. 2d 199, 202 [1942] [Fowler, J. dissenting] [no break in the causal chain, refused to accept "any species of fine-spun reasoning"].

158 *Sponatski's Case*, 220 Mass. 526, 530, 108 N. E. 466, 467 [1915] expressly stated: "This decision rests upon the rule established in *Danials v. New York, N. H. & H. R. Co.*, 183 Mass. 393, 67 N. E. 424 [1903]." [a tort case].

159 See the cases cited in notes 6, 97, 111 *supra* and 384 *infra*.

160 MASS. STAT. 1937, c. 370 § 2 [now MASS. GEN. LAWS ANN. c. 152, § [1958] 26A.]

life. (1919) But the slight weight of authority, but not of reason, still requires some proof, albeit weak, of uncontrollable impulse. (1929) However an impressive and growing minority require only that the injury lead to mental derangement or insanity, and that the mental derangement or insanity lead to the suicide. (1939)

161. *Voris v. Texas Employers Ins. Ass'n*, 190 F. 2d 929 [5th Cir. 1951] [aware he was causing death, yet compensable]; *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464 [Fla. 1949], 5 NACCA L. J. 74 [1950]; *Anderson v. Armour & Co.*, 257 Minn. 281, 289, 101 N. W. 2d 435, 440 [1960], 25 NACCA L. J. 208 [1960] [psychotic depression amounting to insanity from automobile accident at work—plaintiff physically unharmed, but threw pedestrian 80 feet; finally irresistible impulse to kill self—compensable though, "one may commit an act, knowing it was wrong and with full realization of its consequences, yet the act may be the result of insanity rather than the individual's own conscious act."]; *Pushkarowitz v. A. & M. Kramer*, 275 App. Div. 875, 88

N. Y. S. 2d 885 [3d Dep't 1949] [no discussion of the issue of knowing the nature of the act]. See also the English cases in note 163 *infra*.

162. *Wilder v. Russell Library Co.*, 107 Conn. 56, 139 Atl. 644 [1927] [librarian, overworked, became insane and committed suicide—"an act for which she was not morally responsible, and which was due to uncontrollable impulse"]; *Anderson v. Armour & Co.*, 257 Minn. 281, 101 N. W. 2d 435 [1960] [irresistible impulse]; *Lapier v. Baldwin Locomotive Works*, 1269 P. 2d 275, 129 Atl. 451 [1921] [suicide due to uncontrollable impulse]; *Karlen v. Department of Labour & Indus.*, 41 Wash. 2d 301, 249 P. 2d 364 [1952] [found "uncontrollable impulse"]; *Gatterdam v. Department of Labour & Indus.*, 128 Wash. 2d 628, 56 P. 2d 693 [1936] [uncontrollable impulse or delirium, all having origin in foot injury].

163. *Voris v. Texas Employers Ins. Ass'n*, 190 F. 2d 929 [5th Cir. 1951], 8 NACCA L. J. 46 [1951] (although Deputy Commissioner below mentioned "uncontrollable impulse," Circuit Judge Borah nowhere in his opinion relies on that finding); *Burnight v. Industrial Acc. Comm'n*, 181 Cal. App. 2d 816 [Dist. Ct. App. 1960] [breakdown because of pressures of work] slashed wrists—irresistible impulse unnecessary; the sensible and humane view granting compensation when the mental injury deprives the deceased of normal judgment and overwhelms him with the belief that death is his only escape]; *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464 (Fla. 1949) (the injury directly led to the mental disturbance which in turn directly led to the suicide); *Stapleton v. Keenan, Gifford & Lunn Apartment House Co.*, 265 N. Y. 528, 193 N. E. 305 (1934) (awake all night before, because of pain from infected hand; committed suicide by hanging while temporarily insane); *Delinousha v. National Biscuit Co.*, 248 N. Y. 93, 161 N. E. 431 (1928) (injury caused brain derangement which led to suicide—enough—compensable); *McIntosh v. E. F. Hauserman Co.*, 12 App. Div. 2d 406, 211 N. Y. S. 2d 482 (3d Dep't 1961) (fractured skull, seizures, depression, shot self—"insidious breakdown of this man's

The common-law theory that suicide, being a crime, breaks the chain of causation, no longer appeals to the courts.⁽¹⁶⁴⁾ The overwhelming weight of authority holds that suicide following mental derangement or insanity is not wilful self-destruction; hence it is not barred by the usual compensation statute which makes exceptions for wilful intent to injure one's self or another person.⁽¹⁶⁵⁾

The time has now come for strong courts to declare forthrightly that tort theories no longer control workman's compensation suicide cases; all that is required is reasonable proof that the injury led to the mental derangement which in turn led to the suicide, without requiring proof of an uncontrollable impulse.

(10) *Slips and Falls*

- From the outset courts have allowed awards where the employee slipped on the floor, mental and physical capacities"); *Pushkarowitz v. A. & M. Kramer*, 275 App. Div. 875, 88 N. Y. S. 2d 885, 3d Dep't. 1949, *aff'd*, 300 N. Y. 637, 90 N. E. 2d 494 (1950) (eye injury, depressive psychosis, suicide by drinking poison); *Marriott v. Matthy Colliery*, 13 B. W. C. C. 353 (1920) (miner's severely injured hand caused insanity and suicide, by cutting own throat); *Dixon v. Sutton, etc., Colliery*, 23 B. W. C. C. 135 (1930) (miner depressed by nystagmus, found in canal two and one-half miles from home, mental derangement is as competent as insanity to cause death to be result of accident).
164. *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464 (Fla. 1949) (fell from roof, excruciating pain, swallowed poison (potash and lye), suicide is intervening act but not intervening cause—compensable). Cases in note 163 *supra* do not subscribe to breaking of the chain of causation by the suicide. *Barber v. Industrial Comm'n*, 241 Wis. 462, 6 N. W. 2d 199 (1942).
165. *Voris v. Texas Employers Ins. Ass'n*, 190 F. 2d 929 (5th Cir. 1951) (choice to kill self not voluntary, and not within exception of wilful intent to kill self); *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464 (Fla. 1949); *Olson v. F. I. Crane Lumber Co.*, 107 N. W. 2d 223 (Minn. 1961) (work-connected heart attack, depressed, led to mental illness, imagined that people were after him, committed suicide by strangulation); *Anderson v. Armour & Co.*, 257 Minn. 281, 101 N. W. 2d 435 (1960) (not intentionally self-inflicted, as irresistible or uncontrollable impulse—not wilful self-destruction); *Prentiss Truck & Tractor Co. v. Spencer*, 220 Miss. 66, 87 So. 2d 272 (1956) (did not have the mental capacity to determine the consequences of his act—not voluntary or wilful—back injury, depression, suicide); *Burnett v. Industrial Comm'n*, 87 Ohio App. 441, 93 N. E. 2d 41 (1949) (jury said involuntary act—shot himself); *Karlen v. Department of Labour & Indus.*, 41 Wash. 2d 301, 249 P. 2d 364 (1952) (not a "deliberate voluntary intent to take his own life").
166. *Caccamo's Case*, 316 Mass. 358, 55 N. E. 2d 614 (1944) (slipped on water or oil, striking

whether the cause was a defective floor, a slippery floor or a negligent act on the part of the employee himself.⁽¹⁶⁶⁾

Similarly, a fall from any height—as from a staging⁽¹⁶⁷⁾ onto the level floor—has been held to “arise out of” the employment, no matter what the cause of the fall later proved to be. Even if the cause was a non-industrial fit of dizziness, heart attack or any other idiopathic disease,⁽¹⁶⁸⁾ the courts reasoned that the injury for which compensation was claimed was one resulting both from the fall from an elevated position and from contact with the level floor. The claim was for the fractured skull, broken bone, burns or whatever contact-injury occurred, and was not for the idiopathic disease. The causal relation to the work was found both in the increased risk of being on a height and in the contact with the employer’s floor.

Likewise, if the employee fell while standing on the level floor but hit his head on a box⁽¹⁶⁹⁾ or a raised object on the floor, the resulting injury “arose out of” his employment.

head on tauck) ; *Employers Mut. Liab. Ins. Co. v. Industrial Acc. Comm’n*, 41 Cal. 2d 676, 680, 263 P. 2d 4, 7 (1953) (“The injury would be compensable whether the cause of the fall was a slippery or defective floor, or was due to nothing more than his innate awkwardness or even carelessness.”) ; *Morgan v. B. Colliery Co.*, 15 B. W. C. C. 52 (1922) (slipped on floor, with unusual result : choked on nut he was eating).

167 *Gonier v. Chase Co.*, 97 Conn. 46, 115 Atl. 677 (1921) (painter fell from a staging due to idiopathic condition (fainting spell), but died from a fractured skull—award upheld) ; *Rockford Hotel Co. v. Industrial Comm’n*, 300 Ill. 87, 132 N. E. 759 (1921) (fell into pit, did not die from the pre-existing idiopathic condition, but from the burns he received after falling in the pit) : *Watson v. Grimm*, 200 Md 461, 90 A. 2d 180 (1952) (idiopathic dizziness, fell from running board of a truck, run over—compensable as “contributed” to by one factor of the employment) ; *Zaroian v. Aluminum Co. of America*, 270 App. Div. 966, 62 N. Y. S. 2d 75 (Dep’t 1949) (fatal fall from platform about seven feet above ground).

168 Used in the sense of non-industrial, in no way related to the employment—technically like a “primary disease.” WEBSTER’S NEW COLLEGIATE DICTIONARY (1956). See excellent discussion of this subject in *National Auto. & Cas. Ins. Co. v. Industrial Acc. Comm’n*, 75 Cal. App. 2d 677, 171 P. 2d 594 (Dist. Ct. App. 1946) (fell to floor, hit sawhorse at end of bench—overwhelming weight of authority where worker hits something on way down “contributed to by some factor peculiar to the employment”).

169 *Varao’s Case*, 316 Mass. 363, 55 N. E. 2d 451 (1944) (dizzy spell, fell on iron motor box) ; *Garcia v. Texas Indem. Ins. Co.*, 146 Tex. 413 209 S. W. 2d 333 (1948) (a leading case reviewing cases nation-wide—here fall was against a post with sharp edges, considered a special hazard) ; accord, citing *Varao’s Case*, *supra*, *Tapp v. Tapp*, 192 Tenn. 1, 236 S. W. 2d 977 (1951) (“blacked out,” auto ran into ditch—reasonable doubts must be

Falling on the employer's stairway⁽¹⁷⁰⁾ or into the employer's machinery, hot stove or pit⁽¹⁷¹⁾ has long been considered a risk of the employment and hence compensable, even if the cause of the fall had nothing to do with the work. Where the cause is not related to the work—such as a heart attack, dizzy spell or epileptic seizure—it is usually called an idiopathic or non-industrial cause.

If the cause of the fall is unknown—an unexplained fall on the level floor or elsewhere at work—the overwhelming weight of authority allows recovery.⁽¹⁷²⁾ "Unexplained" falls usually lead to a "presumption" of work-connection.

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- resolved in favor of the worker—here work was "contributory cause"—employers take employees "as is"—employment exposed him to this hazard), 7 NACCA L. J. 70 (1951).
 - 170 *Cusick's Case*, 260 Mass. 421, 157 N. E. 596 (1927) (epilepsy on stairway, led to fractured skull).
 - 171 *Rockford Hotel Co., v. Industrial Comm'n*, 300 Ill. 87, 132 N. E. 759 (1921) (epilepsy, fell into pit and was burned to death); *Stasel v. American Radiator & Standard San. Corp.*, 278 S. W. 2d 721 (Ky. 1955) (epilepsy, fell on hot stove causing burns on arms and hands—employment a "contributing cause"); *Dow's Cause*, 231 Mass. 348, 121 N. E. 19 (1918) (non-industrial heart attack, fell into machine, neck severed, compensable).
 - 172 *Upton v. Great Cent. Ry.*, [1924] A.C. 302 (fell on railway platform which was not slippery or defective—cause of fall was completely unknown). Lord Atkinson said: "Here the accident was caused by the performance of an act the deceased was employed to perform—namely, to traverse the platform... (H)aving been done in the course of the employment of the deceased, and the accident having been caused by the doing of it even incautiously, it must, I think, be held that the accident arose out of the employment of the deceased." *Id.* at 315; *New Amsterdam Cas. Co. v. Hoage*, 62 F.2d 468 (D.C. Cir. 1932) (unexplained fall while crossing the street—employment placed him in the position where the accident occurred); *Burton-Shields Co. v. Steele*, 119, Ind. App. 216, 83 N.E. 2d 623 (1949) (fall on concrete floor, cause of fall unknown, found in pool of blood—the "cause of the fall may be disregarded"); *De Vine v. Dave Steel Co.*, 227 N.C. 684, 44 S. E.2d 77 (1947) (found with fractured skull on cement platform where he had been lowering a flag—cause of fall unknown. An inference was permissible that the cause of the fall was industrial); *Robbins v. Bossong Hosiery Mills*, 220 N.C. 246, 17 S.E.2d 20 (1941) completely unexplained fall—as no affirmative evidence that it arose from a cause independent of the employment, and admittedly it was "in the course of" the employment, an award would be sustained). New York has repeatedly upheld unexplained-fall awards. *E.G.*, *Martin v. Plaut*, 293 N.Y. 617, 59 N.E.2d 429 (1944); *Andrews v. L. & S. Amusement Corp.*, 253 N.Y. 97, 170 N.E. 506 (1930).

(171) However, a sizeable number of judges have distinguished the "increased risk" and "unexplained" fall cases from those where a standing employee, for a known or admittedly non-industrial reason, falls on a hard floor and fractures his skull. Even though he asks compensation solely for the new injury and not for any aggravation of the idiopathic disease, they deny recovery. (172) These judges reason that they must stop the payment of compensation somewhere, and the level floor seems to be that spot. And this is so even though the particular factory is one of the very few in the state which has an iron floor or a concrete floor—a decidedly increased risk! (173)

Fortunately, the modern weight of reason and the current weight of authority permits awards for injuries from falls onto level floors, due to non-industrial disease, or unexplained causes. (174) These courts do not distinguish between falls onto the level floor and falls onto

173 *Cinmino's Case*, 251 Mass. 158, 146 N.E. 245 (1925) despite floor of rough cement rather than of wood; *accord*, citing this Massachusetts case: *Riley v. Oxford Paper Co.*, 149

Me. 418, 103 A.2d 111 (1954); *Dustin v. Lewis*, 99 N.H. 404, 112 A.2d 54 (1955).

The majority in New Jersey followed the early 1925 Massachusetts case and others stemming from *Henderson v. Gelanese Corp.*, 16 N.J. 208, 108 A.2d 1267 (1954) epileptic fall on concrete floor, cerebral concussion. See excellent dissent in court below, *E. J. BROWN, JR. Supra*, 353, 104 A.2d 720 (App. Div. 1954).

174 Professor Larson who prefers the theory of non-liability for falls on ordinary level floors, is willing to concede an exception for concrete floors: "This distinction between concrete floors and other surfaces, while it approaches the vanishing point, is not altogether without substance. A dish which, dropped on the kitchen linoleum, might survive, would not have a chance on the concrete floor of a factory." LARSON, *WORKMEN'S COMPENSATION LAW* § 12.14, at 165 (1952). He agrees also that unexplained falls to level floors are and should be compensable on the "but for" theory. "In appraising the extent to which the courts are willing to accept this general 'but for' theory, then, it is significant to note that most courts confronted with the unexplained-fall problem have been fit to award compensation. [T]here is surprisingly little contra authority." *Id.* at § 10.31, at 97. Massachusetts used to be *contra*, but now changed by statutory presumption, *MASS. GEN. LAWS ANN. c. 152 § 7A* (1958).

175 *Employers Mutual Ins. Co. v. Industrial Acc. Comm'n*, 41 Cal. 2d 676, 263 P. 2d 416 (1953) (idiopathic seizure, fall on concrete floor, head injury—compensable. Modern trend recognized) *Savage v. St. Aeden's Church*, 122 Conn. 343, 189 Atl. 599 (1937) (no difference for floor falls—turns out that there was hazard from the fact that the accident happened in a painter found on floor; it would make no difference if cause of fall were fainting or heart attack). *Protecting Awning Shutter Co. v. Clin*, 154 Fla. 30, 16 So. 2d 342 (1944) (fell on concrete floor due to idiopathic heart disease, fractured skull. Excellent discussion of purposes of compensation act, and the desire to spread the

boxes two inches above the floor or into machinery—all falls are compensable where the injury results from contact with the floor or other objects.¹⁷⁶

It should be noted that it is decidedly unfair to the worker to deny him an award when he admits the cause of his fall was non-industrial but to give him an award when he does not know the cause of his fall. In both instances his claims solely for the injury caused by the contact with the level floor.

cost to consumers—if deceased had fallen onto a piece of machinery, an award would hardly be questioned; the fact that he chanced to fall on the floor and lost his life should not preclude an award); *American Mut. Liab. Ins. Co. v. King*, 88 Ga. App. 176, 76 S. E. 2d 81, (1953) ("blacked out"—court said no difference between falling on the floor or against machines—even if exertion did not produce the stroke—found in puddle of blood on floor in water-house, died of subarachnoid hemorrhage); *A. C. Lawrence Leather Co. v. Barnhill*, 249 Ky. 437, 61 S. W. 2d 1 (1933) (dizzy fell on premises near driveway, broke leg—compensable); *Pollock v. Studebaker Corp.* 97 N. E. 2d 631 (Ind. App. 1951) (contrary view "not favored by a majority of recent cases"—but superceded in *Pollock v. Studebaker Corp.*, 230 Ind. 622, 105 N. E. 2d 513 (1952)—as a question of fact, as industrial board had found against the worker—dissent said it was a question of law, and decision below was correct on law); *Burgoughs Adding Mach. Co. v. Dehn*, 110 Ind. App. 483, 39 N. E. 2d 499 (1942) (on public street on duty—had he been sitting on a chair at home when he attacked occurred he probably would not have been injured); *Barlow v. Minneapolis-Moline Power Implement Co.*, 214 Minn. 564, 9 N. W. 2d 6 (1943); *American Gen. Ins. Co. v. Barretto*, 300 S. W. 2d 358 (Tex. Civ. App. 1957) ("blacked out" fell on hard pavement of gravel and shell, fractured skull—fall on hard surface was a hazard to which he was exposed by the employment); *General Ins. Corp. v. Wickersham*, 235 S. W. 2d 215 (Tex. Civ. App. 1951); *Wilson v. Chatterton*, [1946] 1 K. B. 360 (C. A.) (a leading case, overruling an earlier *contra* case, *Lander v. British United Shoe Mach. Co.*, 26 B. W. C. C. 411 (1933) as "bad law"); *Wright & Greig, Ltd. v. M'Kendry*, 11 B. W. C. C. 402 (1918) (in fit, fell on concrete floor of store—not risk common to humanity, but was specially connected with the worker's employment, as he had to work on a hard floor).

¹⁷⁶ See cases in notes 172 and 175, *supra*.

International Court of Justice

BY

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[In this Article, Professor Sethna shows how the International Court of Justice needs to be strengthened. He points out the desirability of amendments for doing away with the veto in the Security Council and for making the judgments of the International Court of Justice really felt and enforced through the strict measures to be taken by the Security Council, in case the State concerned refuses to obey the Court's Judgment. He advocates the having of a criminal jurisdiction for the International Court of Justice, rather than the contemplating of a separate permanent Court under a separate Statute].

—Editors' Note

Introductory

The International Court of Justice is a successor to the Permanent Court of Justice which was under the League of Nations. In 1945, the League of Nations was transformed into the United Nations as a result of the Conference of the Great Powers at San Francisco. The International Court of Justice is an important and effective organ of the United Nations. The United Nations itself needs advice and opinion on international issues; hence, this Court satisfies that purpose. The *raison d'être* of the International Court of Justice is that of providing an effective method for the *pacific* settlement of disputes.

Under Article 36 of the Charter of the United Nations, the International Court of Justice is an integral part of the United Nations. Article 92 of the Charter describes it as the principal judicial organ of the United Nations. The same Article shows that the Statute of the International Court of Justice which describes the Constitution of the Court,

is an integral part of the Charter itself. Every Member of the United Nations is deemed to be a party to the Statute of the International Court of Justice, by reason of its membership of the United Nations. Article 94 of the Charter of the United Nations lays down that every Member shall be considered to have undertaken to comply with the decisions of the International Court of Justice. Whenever a State submits its dispute to this Court, though it may not be bound to do so, it is bound by the decision of this Court. In addition to the jurisdiction of this Court to *adjudicate* on international disputes between States, it has an *advisory* jurisdiction. In its advisory jurisdiction, the Court advises the General assembly or the Security Council or any other organ or specialized agency of the United Nations as may need its advice or opinion. The United Nations can be regarded as the subject of International Law, as held by the International Court of Justice itself in its Advisory Opinion on

*Reparation for Injuries Suffered in the Service of the United Nations.*¹

Constitution of the Court

The International Court of Justice is constituted of fifteen Judges who are elected by the General Assembly and the Security Council in collaboration. These Judges hold office for nine years. These Judges select their President and Vice-President. The President is similar to the Chief Justice of a municipal court.

Under the Charter of the United Nations, the Court should be so constituted as to be *representative*, so that the States which desire adjudication through it may have *confidence* in the *impartiality* of the Judges. Certain seats are reserved for certain States. Not more than one national of a State should be a Judge at any particular time.

In case a dispute is to be decided by the International Court of Justice concerning two States, and if there is no Judge in the Court who is a national of either country, it is open to each of the disputing States to appoint an *ad hoc* judge, for the particular dispute. For the purposes of that particular dispute, the *ad hoc* judge occupies the same position as the other Judges.

Adjudication of Disputes

The States that are parties to the Statute of the International Court of Justice can have their disputes adjudicated by this Court. Other States also can have their disputes adjudicated by this Court, on conditions to be laid down by the Security Council, subject to special provisions in treaties. In this connection, Article 35 of the Statute may be noted. States which wish to have their disputes adjudicated by this Court, must deposit with

the Registrar of the Court a declaration whereby the State concerned accepts the Court's jurisdiction in accordance with the Charter of the United Nations and the Statute and the Rules of the Court. By the declaration, the State also undertakes to comply with the decision of the Court and accepts the obligations imposed under Article 94 of the Charter.

Adjudicatory of Contentious Jurisdiction

Concerning the *adjudicatory* or *contentious* jurisdiction of the International Court of Justice, we have article 36 of the Statute of the Court under which this Court can hear all disputes which are referred to it by the parties to the dispute. The parties agree to refer their dispute by what is known as a '*compromis*'. Even if one of the parties to the dispute refers the dispute or the case to the Court, the other party may agree to the reference even later. If the other party denies the jurisdiction of this Court, it can have no jurisdiction, and the case must be removed from the List of Cases before the International Court of Justice. In 1956 the International Court's jurisdiction was denied by Argentina and Chile when Great Britain had referred its dispute with these States over Antarctica, and the Court had the case removed from the List, for no State can be compelled to refer its dispute, or to submit to a reference made unilaterally by another State in respect of a dispute with the former. It is the *will and consent* of the State that is of primary importance. The International Court can hear the case of the disputing States *only on their consent*. It is only where States have entered into conventions or treaties whereby they are bound to refer their disputes of the type stipulated to the International

1. I. C. J. Reports, 1949, p. 174.

Court of Justice that the States concerned are bound to refer such stipulated disputes to the International Court. It is only with regard to the Optional Clause or to certain specified types of disputes that the States concerned are bound to refer to this Court. What is required is that in *all* cases, i.e. *in any and every kind of dispute*, all States should, by a *universal convention*, be bound to approach the International Court of Justice for decision. The jurisdiction of the International Court of Justice, under the Optional Clause, does not carry us to fruits of peace or even peace. Under the 'Optional Clause', as it is known under Article 36 of the Statute of the International Court of Justice, the States that are parties to the Statute, can, at any time, make declaration that, without the necessity of any agreement in that respect, they do recognise as *compulsory* the jurisdiction of the International Court, with regard to any other State which accepts the same obligation of compulsory jurisdiction, in legal disputes concerning the interpretation of treaties or questions of international law or questions concerning breaches of international obligations and the reparation for the damage as the result of such breaches. But such declarations, under the Optional Clause, are *revokable*. The dispute must be of a legal character. Whether the dispute is of the type specified in the Optional Clause is a matter which can be decided by the international Court.

Questions pertaining to the domestic jurisdiction of States have been excluded. States reserve such questions for themselves. The Optional Clause, it is submitted, is not a satisfactory method for solving international difficulties or for strengthening the Court. The International Court will remain weak and

its jurisdiction not of any avail, unless *all* States agree to refer *all* disputes *compulsorily* to the Court.

Under Article 94 of the Charter of the United Nations, each member of the United Nations, if a party to the dispute, has to abide by the decision of the International Court of Justice. If any such member State does not carry out the dictates of the decision of the Court, then the other State has the right to approach the Security Council which may either recommend what should be done by the parties or pass such orders as it may think fit for giving effect to the judgment. But the Security Council is not bound to make any recommendation or to take any course of effective action against the defaulting State. Article 94 of the Charter requires to be re-drafted, *so as to require the Security Council in every case not merely to make a recommendation but to decide upon a strong course of action to be followed as against the defaulting State*. But even if the Security Council decides upon a strong course, and the defaulting State does not follow or abide by that course, what is the *sanction* behind the decision of the International Court? Who is going to enforce the Court's judgment against the defaulting State, and by what method? The remedy lies in having action taken by the *International Peace Force of the United Nations*. But this peace force will not have any strength, unless we have an universal and total disarmament, *so that war by any State whatever becomes impossible*, the only lawful army being that of the United Nations, that is to say, the United Nations Peace Force.

Advisory Jurisdiction

The International Court of Justice has an *Advisory Jurisdiction* also. The Court renders

advice, whenever the same is sought, to the General Assembly or the Security Council of the United Nations. Any other organ or specialised body of the United Nations also may seek the opinion of the Court. The United Nations is regarded as a subject of International law, as held by the International Court of Justice, in its *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*.² The specialised agencies may apply to the International Court for its Opinion, if authorised by the United Nations, to so apply. The Economic and Social Council, the Trusteeship Council and other specialised agencies have been authorised by the United Nations, to seek the Advisory Opinion of the International Court of Justice. An advisory opinion is just an opinion and is not possessed of the legal force which is a judgment of the court possesses, unless it has been sought by parties who have agreed to take it and to be legally bound by it.

The Court would refuse to give its advisory opinion if the question set before it is not one of law or is embarrassing.

The International Court of Justice decides cases or gives its advisory opinions by applying international law; under Article 38 of its Statute, it is open to this Court to decide even on equitable grounds, if the parties who have referred their dispute before it have agreed to that. But to enable the Court to decide equitably, without considerations of International law, it is essential that the disputants must have clearly agreed to such a course by the Court.³

Need for a Criminal Jurisdiction

Today, we do really feel the great necessity for equipping the International Court of Justice with a *compulsory criminal jurisdiction*, for trial of crimes against peace, war crimes and crimes against humanity, such as genocide. In the absence of such jurisdiction, special courts have got to be established by the aggrieved powers. That was sought to be done under the Treaty of Versailles, for trial of the German Kaiser. The Kaiser was to be charged with "a supreme offence against international morality and the sanctity of treaties".⁴ The special tribunal for the trial of the Kaiser was to be guided by "the highest motives of international policy", and what was not otherwise an offence under the then prevailing law or custom, was to be regarded as offence under the higher law or the law of nature which really guides and should guide the international tribunal in such cases. Though this trial was abandoned, yet, it was accepted that there could be hardly any place for the play of a positivist policy in such cases of offences against all humanity as such. The law of the conscience dictates the necessity for punishment with a precedent for peoples and times to follow. Of course on the question of the measure of punishment, much would depend upon the gravity of the offence itself, its barbarous or inhuman character, along with the consideration of the principle of *respondeat superior*. The principle of *respondeat superior* would, however, mitigate the penalty but not wipe off the crime.⁵

2. I.C.J. R. 1949, p. 174.

3. The Case of the Free Zones of Upper Savoy and Gex, P. C.I.J., 1932, Series A, No. 24.

4. Article 227 of the Treaty of Versailles. See also Fenwick, C.G. International Law, 3rd Edn. p. 668. See also : Garner, J.W., American Journal, Vol. 14, 1920, p. 70.

5. Grotius and Vattel held that penalties should not be such as would prevent the restoration of friendly relations between the victor and the vanquished. Certainly two wrongs would not constitute a right; so the surrounding circumstances and the nature of the offence must be taken into account before the inflicting of the punishment.

After the close of the Second World War, an agreement was entered into, on 8th August, 1945, between United States, Great Britain, France and the Soviet Union for the establishment of an international military tribunal for the trial of war criminals whose offences were not particularly localised. The Charter described the constitution, jurisdiction and functions of the Tribunal. It also defined the atrocious war crimes for which guilty individuals could be punished. Twenty-two war criminals were charged before this military tribunal for crimes against peace, war crimes, and crimes against humanity. On 1st October, 1946, the judgment of the Tribunal was delivered. Three of the accused persons (defendants) were acquitted, but the rest were convicted. The Soviet Judge dissented in respect of the acquittals. The principle of non-liability on the ground of *respondeat superior* was held not applicable. Really that defence could secure just a little mercy which may be shown to the war criminal or the outrager of humanity; but such a criminal cannot escape punishment on this positivist ground of the *respondeat superior*.

Upon the same principles as in the Nuremberg trial, the Tokyo Trial of the Japanese war criminals took place, and the accused were punished, on the ground that

their acts were contrary to the dictates of international policy and custom, and were an outrage against humanity. The acts of the accused persons, being *mala in se*, constituted crimes under the international law.

Doubts were cast as to the *international and impartial* character of these military tribunals at Nuremberg and at Tokyo. It was argued that the Russian member of the Tribunal was not an impartial Judge. Similar argument was adopted against the U. S. representative of the Tribunal. To avoid doubts as to the competence and or the impartiality of an *ad hoc* tribunal, it is best to enlarge the compulsory jurisdiction of the International Court of Justice and to equip it with the compulsory criminal jurisdiction for trial of crimes against peace, war crimes and crimes against humanity. When the trial is at the International Court of Justice, the arguments as to the competence or the impartiality of the Judges of this Court would be minimised. When we have a World Court, why should a criminal jurisdiction not be given to it, in case of offences which are not of a localised character and which require therefore to be tried by an *independent and impartial World Court* with Judges noted for their eminence, world fame and impartiality? ⁶ A *separate* international criminal Court under a

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6. Dr. Julius Stone points out: "While violations of war-law, and even crimes against humanity, present themselves as sufficiently objective to permit trial by tribunals appointed *ad hoc* by victorious powers, crimes against the peace can scarcely establish themselves on such a basis. Contemporary efforts to establish an international criminal court are in part a recognition of this difficulty; and a Statute for such a court and a Convention for its establishment have been drafted by the General Assembly." The Court, according to the Draft Statute, would 'try persons accused of crimes under international law, as may be provided in conventions or special agreements among States parties to the present Statute.' Dr. Stone, agreeing with Dr. Quincy Wright, doubts the efficacy of such an International Criminal Court, though he holds that these difficulties do not affect the desirability of the development of a true international criminal law and a jurisdiction to administer it. [Stone, J. Legal Controls of International Conflict, 1954, pp. 378, 379.] Why should we not have, then, the International Court of Justice given a Criminal Jurisdiction, instead of going in for a separate court?

separate statute is *not* necessary.

Article 34 of the Statute of the International Court of Justice does not give the Court any jurisdiction in criminal matters. The Court cannot exercise criminal jurisdiction over individuals in respect of war crimes or crimes against humanity and other violations of international criminal law⁷. Article 34 should be amended, so as to give the International Court of Justice the necessary criminal jurisdiction. This is better than going in for a separate court.

Conclusion

The International Court of Justice is a very important organ of the United Nations, and in the strength of this Court, in the efficacy of its judgments and their execution, lie the safety of the world and the strength of the Security Council itself. What is necessary is that there should be *an universal treaty* whereby *all States should agree to refer all their disputes to this Court*, and not to resort to interpretation of treaties or international law or custom by

themselves. When two persons are engaged in a dispute, it is for a *third party* to settle that dispute, and such third party, in the case of disputing States can be no other than the International Court of Justice. A compulsory criminal jurisdiction should be conferred on this Court.

For the enforcements of the judgements and decisions of the International Court of Justice, the strengthening of the Security Council is necessary. The vetoing power possessed by States in the Security Council renders much harm, for the Security Council gets prevented taking effective steps for the enforcement of decision of the Court. The unanimity required in the Security Council goes in the way of the Council.

Even an effective line of action taken by the Security Council may lead us nowhere, for the might of the disputing State may enable it to resist any means adopted by the Council. What is necessary is the rendering of war *impossible*. Total and universal disarmament is the only remedy.

7. Oppenheim, L. : International Law, Vol. II, 7th edn., by Lauterpacht, H., p. 57, ft. note.

Compulsory Acquisition and Public Purpose

BY

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The functions of a modern State are not confined to maintenance of Law & Order, Protection of the country against foreign aggression and promotion of international amity but embrace many more aspects, to name but a few, promotion of public health, public morals, commerce and industry, economic development, and more than everything else, progress and prosperity of its citizens. Welfare State is the war cry. That is why the executive power of the State, under the Constitution, includes entering into contracts, carrying on trade and business and everything else that falls within its legislative competence. The demarcation between functions which are strictly Governmental and those which take in other activities is fast disappearing. In actual practice, however, it is realised that while Departments of Government may attend to strictly Governmental functions, it will conduce to more convenience, efficiency and better administration, if the non-Governmental activities are entrusted to Corporations. That is why we have Corporations such as, Life Insurance Corporation, Air Lines Corporation, Road Transport Corporation, State Trading Corporation, Finance Corporation, Mining Corporation, etc. The Government concerned may hold all the shares or the majority of shares but nevertheless exercises effective control over the management of its affairs. For legal purposes the Corporation is a distinct juristic entity but in point of fact it is an agency or instrumentality of the Government created to carry out a policy and achieve a purpose.

Trade and commerce and industry which at one time the monopoly of private enterprise are in several essential or important fields taken over by the State. State monopoly is no longer regarded as an unwarranted interference with the individual right to carry on business but is considered as expedient in public interest, of-course the framers of the Constitution did not envisage the complete exclusion of the citizen from any field of trade or business when the U. P. Legislature sought to nationalise Bus Transport and passed an Act for the purpose authorising the total elimination of the private citizen, the Supreme Court held that the provisions of the Act resulting in the exclusion of the citizen constitute an unreasonable restriction on his right to carry on the business. The constitution was therefore amended in 1951 introducing a proviso in Act. 19(6) which enables the Union Legislature to make a law authorising the exclusion, total or partial of private citizens from any particular trade or industry. Several States have been taken advantage of the amendment and have been launching out on schemes of nationalisation. In spite of this increasing tendency to nationalise and to assume direct control and supervision in the field of industry, still a large domain is left to Private enterprise and the Private Sector. Naturally there is an impetus to the promotion of public limited companies engaged in the production of, not only equipment and machinery, but also of various consumer goods, as for example, vanaspati, Sewing Machines, Soaps, Blades, Automobile

parts, Textiles, Paper etc. Each State is anxious to induce the Capitalist or Industrialist to establish the industry in its own area as it would necessarily tend to employment of labour, increase in trade or business and economic prosperity. Almost the first requirement of any big company is a huge plot of land for construction of factory, labour colonies, staff quarters, etc. Therefore the State agrees to give all the necessary facilities to the company after satisfying itself that the establishment of the industry is for public benefit. The owners of land sought to be acquired resist compulsory acquisition as, by such a step, they are deprived of the bargaining power and when the Government issues the notification under the Land Acquisition Act, they take proceedings in Court challenging validity of acquisition and even impute lack of bonafides to the Government concerned suggesting that the notification is inspired not by solicitude for public interest but by a desire to help a few individuals and enable them to make big profits. One such problem came before the Supreme Court in the Aurora Case. The owner of the land complained "why should my land be taken away without my consent and against my will just because the Government is anxious to help the company. The Government can not convert itself into the land-agent of the company. May-be the Company produces goods which are useful to the public but that is not enough. The public should have the right to resort to and use the premises or buildings proposed to be constructed." The argument for the Government and the Company was that the proposed buildings serve a public purpose in as much as the goods produced are required by or are useful to the public and Government in notifying the land for acquisition is acting in the public interest and not as land-agent of the

Government. The Supreme Court by a majority held that on a correct interpretation of the provisions of the land acquisition Act (Sec. 40 & 41) it is essential that the members of the public should be entitled as of right to use the premises as in the case of a hospital or public park. Justice Sarkar, however, pointed out in his dissenting judgment that it is enough that the products of industry are useful to the public and that it is not necessary that public should have the direct right to resort to or make use of the premises of the buildings of the Company and that was how the Act had always been understood and the acquisitions made by Government for Companies. The decision created a stir all over the country and several Governments found that the notifications made by them were in danger of being declared void and that the Companies concerned which had made huge investments would find themselves in a quandary. Shortly after this judgment of the Supreme Court another case came before it from Punjab. In that case the Government issued a notification that the land was needed for a public purpose, namely, the establishment of a factory for Refrigerators. The cost of acquisition was about 4½ lakhs and the contribution of the Government out of public revenues was Rs. 100/-. The acquisition was attacked as ultra-vires and mala fide. The Supreme Court held that the declaration made by the Government that the property was needed for a public purpose is conclusive unless it can be shown that it is a colourable exercise of power and if the purpose ex-facie is no purpose at all or can never conceivably be related to a public purpose. Repelling the argument that contribution of a nominal sum of Rs. 100/- towards cost of 4½ lakhs was a fraudulent exercise of power, the majority held that the previous decisions had always taken

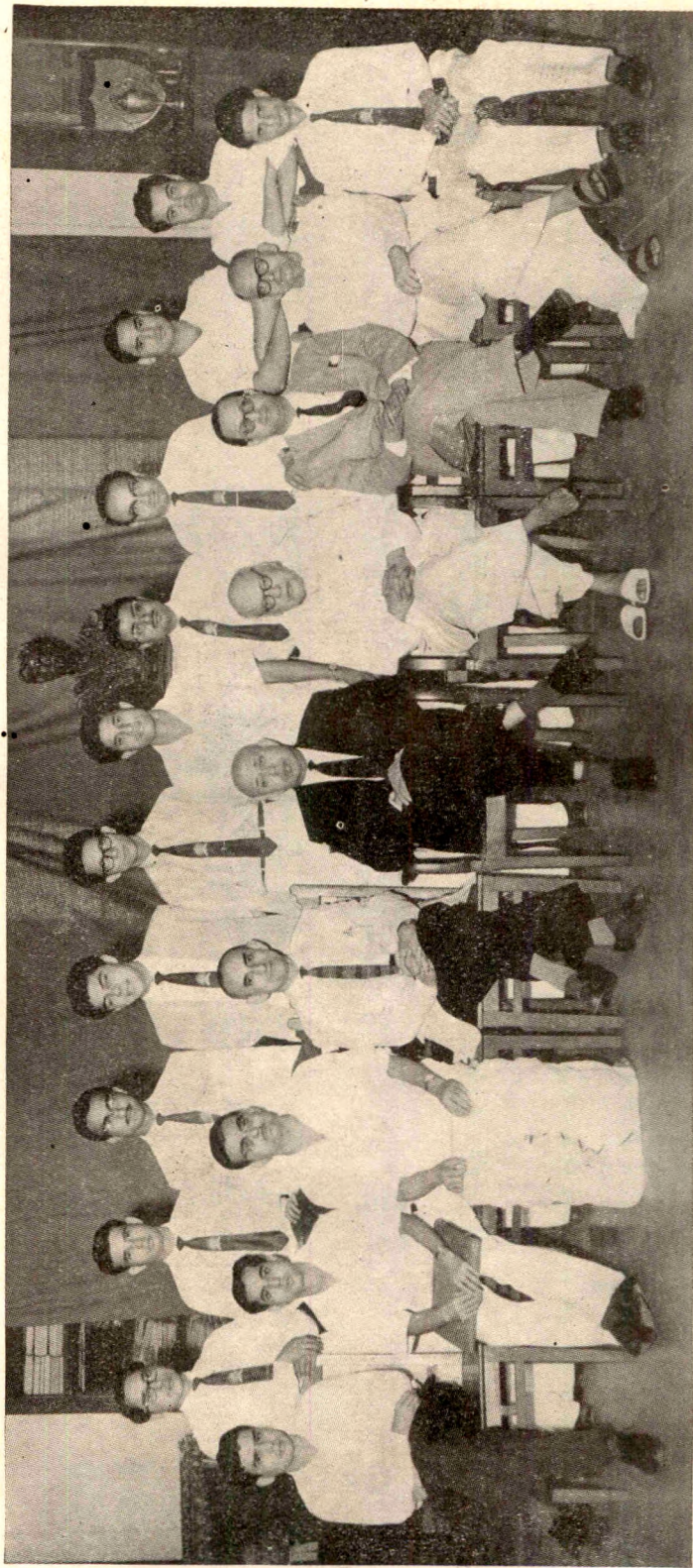
the view that any contribution, however small, would be enough and that by itself can not establish abuse of power and that therefore payment of Rs. 100/- out of public funds would make it an acquisition by the Government for a public purpose as distinct from acquisition for a Company.

The result of the two decisions was that where a notification is issued by a Government, that the property acquire is needed for a public purpose it would be sufficient if the Government makes nominal contribution to the cost of acquisition though in fact and truth the entire cost is borne by Company but if the acquisition is for a Company it is necessary that the public should be entitled to use the buildings or the premises as of right. It was in this anomalous situation that the Union Legislature stepped in and amended the provisions of land Acquisition Act. The effect of the amendment is that in the case of acquisition for a Company, if the undertaking is for a public purpose it would satisfy the requirement of law. The amending Act in substance gave effect to Justice Sarkar's dissenting view that the test of public utility is the proper test. What then is public purpose? Public purpose whether acquisition is for the Government or for a Company, must mean the same thing. In its comprehensive and modern aspect, public purpose is synonymous with public benefit or usefulness to the public. Nobody would deny that production of goods essential to the life of the community is a public purpose. But opinions may vary in regard to goods which are styled "luxuries" as contrasted with "necessaries". But, what is a "necessary" and what is a "luxury" is relative to the items we live in. And there is no definite objective and uniform test. Hundred years ago if any one claimed that a motor-car or a radio or an electric light, a

refrigerator, or cosmetics for the matter of that—were necessities he would have been laughed at. To-day if any one asserts that they are luxuries he would be laughed at. An aeroplane is a "necessary" if the litigant public are to have the services of eminent lawyers or if the nation is to have services of the Statesmen and Politicians. The nation cannot afford to have their nerves rattled or temper upset or time wasted. Similarly Cinematograph equipment and picture production are essential to the life of the Community because without the Cinema most young women and men and even adults would not perhaps be able to know what to do with themselves. Therefore the concept of "necessaries" is elastic, progressive and relative. Even if the real purpose of the Company is to make profit and distribute rich dividends nevertheless the undertaking is for a public purpose, if it is catering to the needs of the public and the products of industry are in demand. Even if the goods are not meant for local consumption but intended for export to outside countries they serve a public purpose in as much as they earn foreign exchange which is in short supply and which is required for the economic development of the country. Thus the recent amendment of the Land Acquisition Act has tended to restore the harmony between the citizen's right to property and the State's control required to serve a public purpose. The only point to be noted however is that if, taking advantage of the declaration of public purpose being conclusive, any Government seeks to acquire property merely to benefit a few individuals where there is no real public purpose and makes pretence of contributing a nominal amount out of public revenues, it would be committing a fraud on power and a breach of trust, inviting and deserving condemnation by the judiciary.

UNIVERSITY COLLEGE OF LAW UNION CALCUTTA

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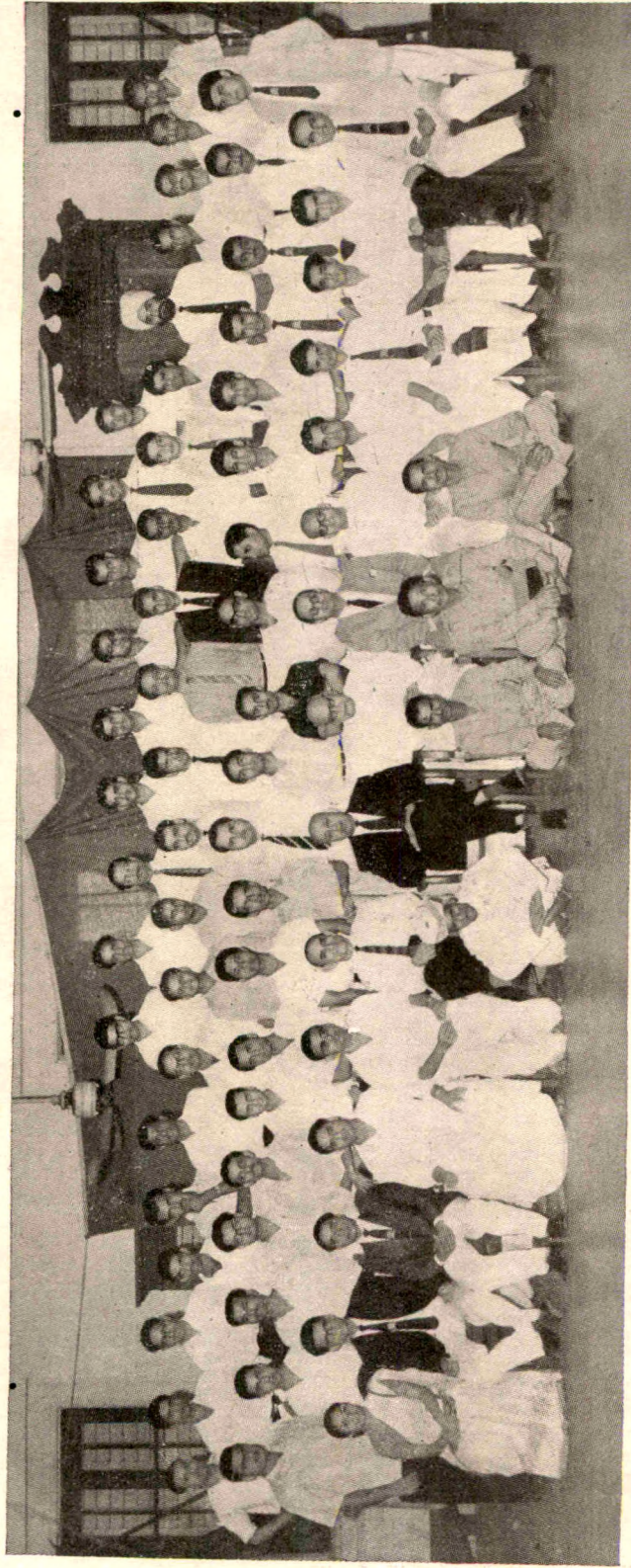
Sitting —Subodh Hazra (*Jt. Secy. Aid fund*), Pranab Mukherjee (*A. G. S.*), Shyamal Chatterjee (*Gen. Secy*), Dr. B. N. Mukherjee (*Vice. Principal*), Sri B. B. Malik (*Vice-Chancellor*), Dr. P. N. Banerjee (*Principal*), Prof. S. K. Mitra (*V. P.*), Sri M. Basu (*Superintendent*), Niranjan Mazumder (*A. G. S.*)

Standing —Paras Nath Singh (*Jt. Secy. & Editor, Magazine*), Anup Deb (*Jt. Legal & Cultural Secy.*), Samir Gati Ray (*Jt. Debate Secy.*)

(*L to R.*) Asutosh Law (*Jt. Secy. Social*), Srikanta Mukherjee (*Jt. Secy. & Editor, Magazine*), Badal Chatterjee (*Jt. Secy. Social*), Ashis Sen Gupta (*Jt. Legal & Cultural Secy.*), Sankar Roy (*Jt. Secy. Aid fund*), Basudeb Kundu (*Jt. Secy. Social*), B. Ghatak (*Jt. Secy. Debate*).

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1st Row Standing—(L to R) B. Mitra, A. Mukherjee, J. Sinha, R. C. Banerjee, M. L. Kar, T. Goswami. A. K. Acharya, R. De, U. R. Sarkar, A. Chatterjee, D. L. Sharma, P. Bonik, B. De. N. Ghose, T. Bhattacharya, B. Chatterjee, (Social Secy), A. Deb (Legal & Cultural Secy), A. Sengupta (Legal & Cultural Secy), S. G. Roy (Debate Secy), A. Law (Social Secy).

2nd Row Standing—(L to R) N. B. Dev, R. N. Saha, P. K. Chatterjee, P. Basu, B. Bose, S. Basumalik, G. Saha, A. P. Shaw, N. Singh, S. K. Arora, G. Poddar, J. R. Sarma, K. P. Bahti, A. Ghosh, M. N. Majumdar, R. B. Singh, R. S. Upreti, R. Shah, S. S. Sengupta, P. J. Pal, G. Ghosh.

3rd Row Standing—(L to R) A. K. Misra, S. Mukherjee, R. K. Mazumdar, M. Kar Bhowmick, S. Dasgupta, R. Dutta, U. Chaki, D. Ghosh, S. Sengupta.

Sitting on floor—(L to R) Ganori, Jagdish, Bahadur, Ramesar, (Bearers).

Psychology and Law

BY

THE HON'BLE MR. JUSTICE P. B. MUKHARJI,

Dean of the Faculty of Law, University of Calcutta.

At one time in the golden past, law might have been a jealous mistress. Today, both the mistress and her lover have become far too promiscuous, and the modern race is one of infidelities on either side. Law has become lax. Votaries of law are still more lax. The first laxity came with law's and lawyer's overtures with philosophy. These overtures did not lead ultimately to any kind of holy, or unholy marriage between law and philosophy but a kind of desecration of both, which may be described in modern literature as "free love" between the two, with no responsibility for either. So the ancient and modern systems of jurisprudence toyed with philosophy. Every system of jurisprudence developed its pet philosophy of law. The nature of law, its origin, its purpose and especially its association with different political philosophies are the orthodox and traditional problems of this philosophy of law. But jurisprudence, whether ancient or modern, has so far ignored the significant part played by psychology in law and its varied administration. The reason perhaps is that psychology is still regarded as unfashionable and in some quarters it is considered far too recent and spurious branch of human knowledge which still has to be watched dubiously. The romantic phase of law's honeymoon with philosophy has disappeared into the thin mists. Law to-day has shed most of its idealism. Modern law has become administration. We are supposed to

have become practical. The concern of the modern jurists is more with the mechanics of law than with its statics. Psychology therefore has become more important in modern law than abstract philosophy. Continued disregard of psychology in the field of jurisprudence will soon derail law and its administration. This therefore is a plea for recognition of psychology as a vital element in modern law.

Law depends on psychology, for its aspiration, enunciation and application. It springs from individual and social psychology, and works with it. Its successful effectiveness is entirely dependent on psychology. To illustrate the importance of psychological climate in the world of jurisprudence, a four dimensional view of the problems can be taken as (1), psychology of law, (2) psychology of judges, (3) psychology of lawyers and (4) psychology of litigants.

Psychology of law gives a more practical answer to the origin and nature of law than any other schools of thought. The historical, the analytical, the sociological, the functional and the purely philosophical schools of jurisprudence are no longer in the sunshine of legal fashions. Human psychology, individual and social, provides the raw materials of law. It also determines its shape and form. It governs its administration and sanctions. Obedience or resistance to law and the practical applica-

tion of sanctions and theories of punishment, as reformative, punitive and deterrent are dependent on psychology. Individualistic psychology will provide certain types of law and their enforcements. Socialistic psychology will provide other patterns of law and their applications. Within individual and social psychologies there can again be various shades of differences which may be reflected in the laws and their enforcements. Political and economic philosophies can again overwhelm psychology so much as to make their impact clear in jurisprudence, and alter the very contours of law and their purpose. Democracy will have one view of the law, the process and purpose of law making and its application. A monarchy, or an oligarchy or an aristocracy will have different views of law, its purpose and its application. Within the democratic philosophy of state there may again be endless differences in psychology resulting in capitalistic, socialistic, communistic, syndicalistic and other views of law. Non-believers in State philosophy, the nihilists, or the extreme individualists will have different psychological approaches to law. The psychology of behaviour, individual social or group, is an integral part of law, its contents and its machinery. Law in the ultimate analysis, is nothing more and nothing less than the "sense of law" prevailing in the mind of the individual and the society, at a particular time. Such a view of the law, as essentially psychological, contains the best elements of all the different schools of jurisprudence that have preceded the modern age.

Human nature, in its world of thought and in the world of behaviour, is the total source of law. Psychology of man therefore, in all its aspects, is the ruling spirit of law. The life of law is psychology. It is a little less flabby and

more matter of fact than the Holmesian dictum that law is life or experience. What springs of desires, what springs of motives and what springs of the human mind bring man into action individually, socially, nationally and internationally, should really be the true nature of jurisprudence and its problems of study. "Animus" in law has been recognised in jurisprudence. Psychological motives are not altogether ignored by the traditional schools of thought, but they have as yet received no systematic analysis, study and attention in jurisprudence. Law has always fought shy of psychology, lest it uncovers horrifying and revolting chambers of human nature, and upsets our outwardly well-groomed horse-and-buggy apple-cart of law. It has, therefore, always tried to take to the device of overt acts as distinguished from covert desires. In making this distinction and in choosing to leave out the essential psychology of every action, orthodox jurisprudence has been aided by the specious doctrine that it is easier to judge overt acts and more difficult to judge the human mind. The result has been loveless laws and lawless loves. Organised cruelties have passed as laws and raging injustices passed off as immunities. The ancient laws of marriage are superb examples of loveless laws and the penal codes of the Civilised World are splendid proofs that many of the outrageous crimes do not come within their fold. The former is loveless laws and the latter lawless loves. But judging the human mind has made rapid advances in modern psychology including experimental psychology. It is no longer so closed a chamber as it was thought before. But unfortunately law has failed to keep abreast of all the modern developments in psychology. This is a bald and brief indication to show, why and how, the

main concern of modern jurisprudence should be the psychology of law.

Psychology of judges is a crucial element in the administration of law. The ideal judge is one who can logically balance the arguments for and against a legal controversy. In practice however, within the limits of human nature and education, the judge remains fallible. He can neither hope to have all the materials for and against nor can he devise the faultless scale by which to balance them and see which side dips. The human judge has to suffer both from internal defects and external deficiencies. He is handicapped both by natural and environmental limitations. The place of prejudice in human judgements will remain an unexplored continent without the help of psychology. No discipline, no training, no system, however perfect, can eliminate prejudice from the human mind. The result is that there are pro-plaintiff judges, pro-defendent judges, pro-prosecution judges, pro-defence judges, pro-labour judges, pro-capital judges, pro-taxation judges, pro-taxed judges, pro-landlord judges and pro-tenant judges, pro-marriage judges and pro-divorce judges, capital-sentence judges and life-sentence judges, and in one word conservative and radical judges, bold and timid judges. Much of the psychology is not apparent and most of its operation is sub-conscious and unknown to the judges themselves. These handicaps arise from the moods of man, his mind and body and from the climate of his environment, the environment which brought him up and the environment in which he lives. They all form a part of his inarticulate equipment, inherited and acquired. It was thought at one time that education cures man of his prejudices. It is now thought that education, such as one gets today, only

accentuates such prejudices. A very important role of the judges is to evaluate human nature and conduct. In that very important duty the psychology of the judge dominates inspite of the rigorous limitations of the laws of evidence, procedure and record. The judge has still to judge the demeanour of witnesses before him, but the judging of the demeanour varies with the psychology of the judge trying. Some judges are liberal with the foibles of man; others are violent over them. To some judges lapses of memory are human while to others they are deliberate falsehoods. Some are technical while others are generous. Psychologically some judges are prone to take a narrow view of men things and statutes and equally on the other side there is the psychology of judges who are disconcertingly expansive to take a liberal and more spacious view of men things and statutes. It follows that a major problem of study in jurisprudence is the psychology of the judges and the part it plays in the judicial process of arriving at decisions. The great American Judge, Benjamin Cardozo, in his famous "Judicial Process" came near this area of psychology.

The role of psychology is interesting in its relation to lawyers. As there are judges and judges, so there are advocates and advocates. Some always believe that their clients are invariably wrong and some always believe that their clients are infallible and in every sense. Between these two extremes of psychology of lawyers there are many intermediate stages of cold, warm of tepid beliefs and convictions. It is said that unless an advocate is convinced of the infallibility of his client's case he cannot hope to do justice to him. As a psychological attitude it is obviously wrong. In the first place it makes the advocate blind which prevents that live awareness of defects so essential from the practical point of view. In

the second place, it always gets into trouble with the psychology of the judges. The wise lawyer will train his psychology to suit his purpose. The psychology of lawyers changes imperceptibly by their long and continued association with particular interests and clients such as the Government, the taxing authority, the police, the prosecution the labour, and the management. This psychological encrustation stands in the way of proper presentation of cases. A main concern of the study of law should therefore be to analyse and examine the psychology of lawyers.

Psychology of litigants is responsible for many right and wrong decisions by courts and is also responsible for many right and wrong presentation of cases by their lawyers. The over-confident litigant is a familiar psychological type. The timid litigant, the hesitant litigant, the nervous litigant, the scheming litigant, and the arrogant litigant, represent some of the various psychological types, in addition to maniacs, schizophrenics or melancholics. Discovery of truth and fact through the barrage of such psychological obstruction demands a fair knowledge of psychology and workings of the mind. The normal litigant with a normal and healthy attitude to lawyers and to courts, is as ideal a person who does not exist, as the ideal judge or the ideal lawyers. Cases are lost and won

more on psychological grounds than realised. The client who runs into details and fails to see the wood for the trees not only gives a false picture to his lawyers but also to the courts which ultimately decide his case. Again, the atmosphere of the court is sometimes so uncongenial and unfamiliar to the litigants for whom the court exists that he is hardly ever at his best. He always feels that he is out to be tricked. In that climate truth and justice become difficult to find. A proper study of the psychology of the litigants from this point of view can perhaps lead to a better tone of law and its administration.

This short legal excursion does not claim at all to be fully exploratory. It is only intended to show the importance of psychology in the study of law. The increasing tempo and speed of modern life, the conquest of time and space, and the staggering discoveries of science and technology have created a psychological revolution. They have made most of the laws archaic, most of the procedure ineffective and much of the present legal mechanics of legislation, courts and administration obsolete. Jurisprudence must therefore recognise now the significant role of psychology in law. Continued failure to disregard psychology will make law powerless and its administration behind times.

Chinese Aggression and International Law

BY

HON'BLE J. D. N. SINHA

In September 1962, the Peoples' Republic of China wantonly invaded India. Previously it had annexed a huge area in Ladakh, but the operations were in the nature of a surreptitious infiltration into Indian territory. This time, in the N. E. F. A. area of Assam, it was a full scale invasion. War was not formally declared, but there was all the paraphernalia of it. A massive army was hurled against an unprepared frontier, with tragic effects, so far as India is concerned.

The object of this article is to discuss some aspects of this undeclared war, from the point of view of public International Law. The first question that may be asked as to what 'Law' has got to do with a war. Certainly, when a nation goes to war, it does not consult its lawyers, nor are lawyers of much use in the fighting of a war. But it is not strictly correct to say that Law has nothing to do with the fighting of wars. As will presently be found, law is very much interested in wars, which forms an important branch of Public international Law. The participants in a modern war belong to civilised humanity and we have marched a long way from the brutal ways of our primitive ancestors, who considered that the only law was the law of the tooth and-claw, the law of the jungle. War is the alternative tactics to negotiation, on the International scene, and its function is to impose by force

the will of one group on another.¹ "Resort to force in any form" says Schwarzenberger "is a step back in an ever continuing civilising process. If indulged in by organised social groups, it depends on the relative size and number of the contestants and the potency of the means of destruction which are at their disposal; whether their armed conflicts seriously endanger the material bases of civilization and the values for which it stands. In particular if the chain reaction of negative reciprocity is set in motion, the risk of a relapse into pristine savagery is greatly increased".² The Chinese and the people of India constitute approximately one third of the human race, and this war may easily end in a world conflagration.

Dr. Quincy Wright has pointed out that as civilization proceeds and we are able to communicate and travel long distances at dynamic speeds, the world must be taken to have shrunk considerably. In such a diminutive world, the inmates must live in perfect amity and co-operation. "Prediction of the nature of human values and Institutions" says the learned author, "which will be accepted for even a limited future becomes impossible in a world without law, when both technology and opinion are subject to sudden change and when the incalculable destruction of war may abruptly change the conditions

(1) 'Power Politics' by G. Schwarzenberger.

(2) "Functions and Foundations of the Laws of War".

of political authority, of social cohesion, of ethical belief and of human life. Co-operation to control the course of human civilization becomes impracticable as the state of mankind increasingly resembles that of scorpions in a bottle, with distrust and tension continually augmented by the vulnerability of each to the venom of all".³ International law is, therefore, more necessary in the world of to-day than it has ever been before, but it is difficult to maintain for the very reasons that make it necessary.

Let us first of all understand the branch of law which is called Public International Law, before applying it to the facts of the present case. Various definitions of Public International Law have been given from time to time. According to *Sir Henry Maine*, "The Law of nations is a complex system; composed of various ingredients. It consists of general principles of right and justice, equally suited to the conduct of individuals in a state of natural equity and to the relation and conduct of nations." According to *Oppenheim*, "Law of Nations or International law is the name for the body of customary and conventional rules which are considered legally binding by civilised states in their intercourse with each other." According to *Fenwick*, "International law may be defined in broad terms as the body of general principles and specific rules which are binding upon the members of the International community in their mutual relations". According to Chief Justice *Lord Coleridge*, "the law of nations is that collection of usages which civilised states have agreed to observe in their dealings with one another". There has been a lot of speculation on the subject whether International Law is law in the true sense or not, Hugo

Grotius, described as the "Father of International Law", called his work "The Law of War and Peace". *Oppenheim* divides his work into two volumes, the one relating to the law of war and the other to the law of peace. It is certainly not principally a law of war, because it states the right way of doing things in a community so that war may be avoided. There used however to be a school of thought which declared that Public International Law was not a law at all because every law must be backed by an authority which can enforce it, and there can not be a sovereign authority over an independent state which can make it obey the rules of International law. Thus, *Austin* describes international law as "positive international morality" which consists of "opinions or sentiments current among nations generally". *Holland* went to the extent of saying that "International law is the vanishing point of jurisprudence". This view of *Austin* or *Holland* must be considered now as archaic, and does not accord with the modern conception of International Law. According to *Lawrence*, the precepts of international law are rules, whether they are laws or not. To quote him "The rules, though like other rules they are sometimes evaded and sometimes defied; do nevertheless receive general obedience. They are no more reduced to a nullity by being sometimes broken, than are the laws of the land, because the habitual criminal disregards them with impunity". According to *Oppenheim*, law is a body of rules for human conduct within a community and the family of nations is a community which has rules of conduct which are both conventional and customary. The Declaration of Paris of 1856, the Hague Regulations of 1899 and 1907, the Aerial and Naval Conventions, the Pact of

(3) "The place of International Law."

Paris, the Charter of the United Nations and the Universal Declaration of Human Rights (1948) are all rules of this nature and must be obeyed. International Law is not without sanctions. The sanctions prescribed by the United Nations ; International public opinion ; Intervention of States ; Collective Security, withholding of recognition etc. are all sanctions imposed by International Law. According to Pollock, "If international law were only a kind of morality, the framers of state papers concerning foreign policy would throw all their strength on moral argument. But as a matter of fact, this is not what they do. They appeal not to the general feeling of moral writings but to precedents, to treaties and to opinion of specialists". The reference to treaties in the citation from Pollock underlines the consent theory of international law. According to Oppenheim, the rules of international law have grown up as a result of the common consent of the states. This consent is not always express but may be tacit. According to the Permanent Court of International Justice, "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievements of common aims".

This consent theory is not of course completely accepted by all jurists. According to Kelson, "The states are bound by general international law without and even against their will. Thus, for instance, a new state, as soon as it comes into existence has all the rights and all the duties stipulated by general

international law." This could not happen if individual consent was necessary in each case. The true basis of international law lies in the fact that the whole of the world has now been linked up and it is difficult for one part to live in isolation from others. This requires a set of rules by which the relations of the states and the individuals can be regulated when they come into contact with one another. International law is binding on states because they are states. This is now an universal doctrine. It is however unanimously agreed that all civilized states are called upon to honour their treaties and agreements, solemnly arrived at between the two high contracting parties. Otherwise, it is easy to see that there is bound to be lawlessness and chaos in this world, detrimental to the higher interests of humanity at large. In this background, I am going to place certain facts before you, so that you may come to your own conclusion about the Chinese invasion of India. Very little comment will be necessary.

In 1953, negotiations were commenced in Peking between the Government of India and the Central Peoples' Republic of China on relations between India and China on Tibet. The Government of India was represented by Mr. N. Raghavan, Ambassador of India accredited to China at Peking and officials of the Ministry of Foreign Affairs. The Peoples' Republic of China was represented by Change Han-fu, Vice Minister of Foreign Affairs and officials of the Chinese Ministry of foreign affairs. On April 29, 1954 was signed an agreement between India and China. It was solemnly agreed that the agreement was based on five basic principles which are as follows :-

- (1) Mutual respect for each other's territorial integrity and sovereign rights
- (2) Mutual non-aggression

- (3) Mutual non-interference in each other's internal affairs
- (4) Equality and mutual benefit and
- (5) Peaceful co-existence.

These five principles have come to be known as the *Panch Seela*. 'Panch' is a word derived from sanskrit, and means 'five', the word "Sheela" means a norm or rule of conduct. On May 15, 1954, Mr. Nehru said as follows in the Lok Sabha :—

"An event—and a very important event—that I would like to draw the attention of the House to, is the agreement between India and China in regard to Tibet. That agreement deals with a large number of problems ; each one of them perhaps not very important in itself but important from the point of view of our trade, our pilgrim traffic, our trade posts, our communications there and the rest. It took a considerable time to arrive at this agreement not because of any major conflict or difficulty but because the number of small points were so many and had to be discussed in detail. The major thing about this agreement to which I would like again to draw the attention of the House is the preamble to that agreement. I shall read that preamble. It states :

The principles and considerations which govern our mutual relations and the approach of the two countries to each other are as follows....."

Then followed the enumeration of the Panch Sheela or five basic principles, already mentioned above. The Prime Minister continued—"These principles not only indicate the policy that we pursue in regard to these matters not only with China but with any neighbour country, or for that matter any other country : but it is also a statement of

wholesome principles, and I imagine that if these principles were adopted in the relations of various countries with each other a great deal of trouble of the present day world would probably disappear." On 28th of June, 1954 a joint statement was issued at New Delhi by Mr. Nehru, Prime Minister of India, and Mr. Chou En-lai Prime Minister of the People's Republic of China who came to India at the invitation of Mr. Nehru. In that joint statement, these five principles were reaffirmed. The statement said :—

"If these principles are applied not only between various countries but also in international relations generally they would form a solid foundation for peace and security and the fears and apprehensions that exist to-day would give place to a feeling of confidence....."

At the invitation of the Burmese Prime Minister Mr. U. Nu, Mr. Chou En-lai paid a visit to Rangoon and adopted the Panch Seela as the basis of their relationship. The statement said :

"If these principles are observed by all countries, the peaceful co-existence of countries with different social systems should be ensured, and the threat and fear of aggression and interference in international affairs would give place to a sense of security and mutual confidence.".

The principle of Panch Seela was subsequently adopted by Laos, Nepal, the Democratic Republic of Viet Nam, Yugoslavia, Egypt, Cambodia, Soviet Union and Poland and has been generally endorsed by other nations of the world.

In 1955, twenty-nine countries of Asia and Africa comprising nearly three-fifths of the world's population met on April 18, 1955 at

Bandung in Indonesia. This included the People's Republic of China. The principles enumerated in the Bandung communique were based on the Panch Sheela and elaborated upon it. They included the following :—

- (1) Respect for fundamental human rights and for the purposes and principles of
 - the Charter of the United Nations
- (2) Respect for the sovereignty and territorial integrity of all Nations.
- (3) Refraining from acts or threats of
 - aggression or the use of force against the territorial integrity or political independence of any country.
- (4) Settlement of all international disputes by peaceful means such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice in conformity with the Charter of the United Nations.

The Chinese Prime Minister Mr. Chou En-lai declared that his country was prepared to have normal relations with all African and Asian nations, particularly her neighbours, on the basis of Panch Sheela (4). At Djakarta on April 26, 1955 he declared that the declaration of world peace and co-operation adopted by the Asian African Conference was entirely in keeping with the five Principles of Peaceful Co-existence (5). He reaffirmed this at Peking on 4th October 1955 (6). On 23rd June, 1955 a joint declaration was issued by Mr. Nehru and Marshal Bulganin, wherein the principle of Panch Seela was re-affirmed and even amplified. Mr. Khrushchev, addressing the Indian Parliament on 21st November, 1955, said as follows :—

"The friendly ties between our countries are strengthened and that conduces to the vital interests of our two peoples and corresponds to the five principles of peaceful co-existence proclaimed by India and China. Nowadays these principles were agreed to be followed by nations populated by the vast majority of mankind including the great peoples of China and Tibet."

After the expression of these lofty sentiments, it sounds almost like an anti-climax, that shortly thereafter, the People's Republic of China quietly transgressed into Indian territory and gobbled up several thousands square miles of land at Ladakh. At that time India, relying on the assurance of the Panch Sheela agreement, did not have a single soldier at the spot. The territory has not yet been regained, but continues to be under military operations. The story in the NEFA region is more sordid. While in Ladakh there was a quiet stab in the back, in the NEFA, China has staged on unabashed aggression on a massive scale. The Chinese have occupied by force, regions which they have previously admitted to be Indian territory. In this case, it has been full-scale war, with the latest automatic weapons. It has been characterised by Mr. Nehru as an 'undeclared War', as it undoubtedly is. Now I shall tell you a little of China itself. The Committee for the drafting of the Constitution of the People's Republic of China, headed by Mr. Mao Tse-tung, was formed by the Central People's Government Council on 13th January 1953. In a speech delivered by Mr. Liu Shao-chi at the First National People's Congress of the

(4) The Hindusthan Times, April 20, 1955.

(5) The Hindusthan Standard. April, 27, 1955.

(6) The Hindusthan Times, October 7, 1955.

People's Republic of China, convened to approve of the draft constitution, he said as follows :—

- “First, our country is no longer in the position of a colony or vassal State under the domination of foreign imperialism..... For more than a hundred years, the Chinese people made untold sacrifices to free themselves from domination by foreign imperialism. The great nation-wide movement to resist American aggression and to aid Korea conducted since 1950 has further strengthened the position of our country as an independent State. She has assumed her place as a great Power in the international arena. Together with the Soviet Union and the People's Democracies, China has become a strong bulwark of world peace.”

I do not intend to go into matters that appertain to politics. What I am concerned with are the basic principles of international Law which require that those who claim to be the bulwarks of Peace should honour their agreements solemnly entered into. I have shown how China has declared, ratified, affirmed and reaffirmed the mutual agreement between India and the People's Republic of China, not to take recourse to aggression, but to settle all disputes by negotiation or arbitration or through recognised mediators like the United Nations. What it has done is a gross violation of the agreement and it is clear to all students of International Law that the People's Republic of China is guilty of an offence under International Law. The question of course is as to what is the remedy? The prime remedy is, of course a military one. All aggressors should be taught in the field of battle that war does not pay any longer and the world is too far advanced to tolerate the barbarity of war.

There are however sanctions under International Law. There exist means by which the United Nations can help in the matter and come to our assistance. I shall enumerate a few instances in which complaints were made by, against or on behalf of the People's Republic of China before the United Nations. On September 20, 1950, the U. S. S. R. charged that the U. S. A. had been guilty of aggression against the People's Republic of China by ordering the blockage of Taiwan and proposed that it be referred to the General Assembly at its fifth Session. On November 27, 1950, the Chairman of the First Committee invited the representative of the Central Chinese People's Government to take part in the discussion. Ultimately, the complaint was rejected. On August 28, 1950, the Minister of Foreign Affairs of the Central People's Government of China charged that on August 27, Military Aircraft of the United States forces had flown over Chinese territory and had killed a number of persons. He asked the Security Council to condemn this U. S. A. aggression and to take immediate measures to bring about the withdrawal of the United States forces from Korea. On 31st August, the U. S. S. R. drafted a resolution to condemn the illegal Act of the United States. This resolution was ultimately defeated in the Security Council.

On September 24, 1950 the Central Chinese People's Government charged that United States Military Aircraft had bombed the city of Antung. It asked the General Assembly to recommend that the Security Council take effective measures to condemn aggression by the U. S. A. and bring about promptly the withdrawal of the U. S. A. forces in Korea.

A further complaint was made of stoppage and illegal inspection of a merchant ship. The U.S.S.R. proposed a resolution condemn-

ning the U.S.A. The draft resolution was rejected by the General Assembly.

It is obvious therefore that the People's Republic of China has fully availed itself of the machinery of the United Nations. The problem of a non-member State was considered by the United Nations at its formative stage. Previously it was considered that non-member states could not be compelled to recognise an international Institution unless it was a member. This indeed was the stunting block of the League of Nations and a barrier to its activities. "The founders of the United Nations" says Schwarzenberger (7) "Felt justified in adopting a bolder course. They relied on the fact that all the leading powers of the world would be members of the United Nations. The Organisation was charged with the duty of ensuring that, so far as might be necessary for the maintenance of international peace and security non-members would comply with the principles of Article 2 of the Charter".

Thus, the United Nations has attained Universality in the scope of its actions, and "The Security Council" says Schwarzenberger, "is the guardian-in-Chief world peace. Its discretion on what constitutes a threat to Peace or aggression is practically unfettered."

The sanctions that can be imposed by the United Nations include economic sanction and other non-military sanctions which include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication. Members of the United Nations may be asked to apply any of these measures. Should non-military sanctions prove to be inadequate the Security Council may take such action by air, sea or land forces as may be necessary.

to maintain or restore international peace and security (article 42) Members are bound to hold immediately available national Air Force contingent for combined international enforcement action to the extent agreed upon (Articles 43, 45).

Article 57 of the United Nations charter provides that members of the United Nations may take measures in individual or collective self-defence, until the Security Council takes measures to maintain international peace or security. They must report immediately such measures to the Security Council and the Security Council remains free to take whatever action it deems necessary to maintain or restore international peace and security.

There is of course the loophole that a permanent member of the Security Council may exercise its veto and thus render material help impossible. I think however that it is better to know our friends and our foes, rather than live in a make-believe world of illusion. At least, if China will not abandon her unabashed invasion of India, let her be declared as, what international law calls, an "International outlaw", beyond the pale of the civilized communities of the world. It will at least be a step towards the preservation of the human race.

Before concluding I would like to refer to the contribution to International Law which India has to offer. Even in ancient India, the comity amongst nations or the philosophy of war and peace was not neglected. But the tremendous message that India gave to the world was that of Peace.

Over a thousand years ago, Lord Buddha taught the world to refrain from violence and we made a present of this to China which accepted the teachings of the Enlightened

(7) Power Politics 2nd Edn. pp 432.

one. •Edwin Arnold in his 'Light of Asia', puts this teaching inimitably :—

“Here the five rules aright
Kill not-for Pity's sake-and lest Ye slay
The meanest think upon its upward way.
Give freely and receive, but take from none
By greed, or force, or fraud what is his own.”

This was the first commandment preached by the Tathagate and the *Pancha Seela* to which China has solemnly agreed is based on this original *Pansil* or fundamental Precepts.

The Emperor Asoke based his edicts on these precepts or *Silam*. The *Priyadarsi* commanded his subjects to eschew all forms

of violence and be compassionate to the meanest of living things. While eschewing all forms of violence and the determination of disputes by force, it was however formally laid down by the law-givers in India that there is nothing more sacred than the defence of the motherland or the fighting of a righteous war. Lord Krishna said to Arjuna at the battle of Kurukhetra “There is ‘Arjun, nothing more welcome to a Kshatriya than the fighting of a righteous war. For him who lays down his life in a just battle, the gates of heaven are open.”⁸ Our gallant Jawans engaged in in the sacred battle of defending the motherland, should know that the law, human or divine, is on their side.



(8) Bhagbad Gita Ch. II Sloka.32.

যদুচ্ছয়া চোপপন্নং স্বর্গদ্বারমপাবৃতম্
সুখিনঃ কৃত্রিয়াপার্থ লভন্তে যুদ্ধমীদৃশম্ ॥

“Visitors”

BY

SAMIRAN SEN, *Deputy Sheriff & Marshal,
High Court, Calcutta.*

Many amongst us are unfortunate witnesses to a few human beings with abnormal minds visiting the precincts of the High Court, its offices and the chambers of lawyers.

We in Sheriff's office are some of those unfortunate men who had the opportunity of coming into contact with a few of them. With apologies to them and all others concerned I present them as hereunder.

Immediately after joining my office as Deputy Sheriff I came across one gentleman while seated at the office on a morning. He entered my room quietly and accosted me “What have you done with my several applications I sent to you”? That pulled me up and I wondered. When I was about to enquire, he plunged into his complaint. He set about immediately to trace his family tree without any break or pause. I was caught in his spate of words. He referred to his descending on the direct line of the famous Majumdars of Calcutta in its good old days. The Majumdars, according to him, owned Govindpur and Kalikata, and the Government and the inhabitants of those places were tenants under them liable to pay rents. He brought out a paper which he flourished under my nose as a statement of account showing liability on the part of such tenants to the tune of—Rs. 737000/14/3. The liability for arrears covered a period of hundred years. He was in dead earnest, anxious to enforce payments of

the arrears. At this juncture the Chief Officer of my office broke in upon my visitor's ancient claim and addressed “Majumdar-mahasay! why have you come here? Come into my room, I have already placed orders for your tea”. The gentleman immediately rose to his feet and turned to my officer and said “Ganguly—mahasay! your Deputy—Sheriff is a new-comer, he did not know me and that is why I came here to introduce myself and to request him to expedite payment of my claim. I look to the Sheriff's Office to realise the dues by execution of my claim”. He left as he entered without ceremony.

Later on I came to know that the gentleman was highly—educated and an M. A., B. L. of the Calcutta University. His century—old claim for rent was a loud bee on his bonnet. He used to call four to five times a month and we could only accede to his claim for a cup of tea. This seemed to satisfy his claim. To precipitate his departure we occasionally pressed upon a two anna bit as his bus fare. His visits of late have ceased.

Another educated person, rather young, called on me and complained against my officers that they were not helping him to get possession of a house which, as he said, was being wrongfully occupied by a trespasser. He sought to impress upon me the illegal nature of such trespass. The gentleman became a regular and common feature during working

hours and we could not shake him off. Rebuffs and rudeness had no effect upon him. He insisted upon his rights. At last my officers hit upon an idea to be rid of him. They informed him that the Court had not sent the order for possession to the office and as soon as the order would be received from the Court they would immediately proceed to execute the same. He was asked to move the court for expedition. The word "Court" seemed to scare him. It appeared that he had a fixation upon the word "Court". He was afraid of committal if he went to Court. He took us into his confidence on this. Ultimately a few annas relieved us of his attentions for the day. His visits became so frequent and oppressive that we were at a loss to know how to put a stop to it. In the end one—clever person of my office bargained with him and bought him off and he agreed not to plague us with his visits in consideration of a payment of Rs. 5/- which we promptly made. I must say he has kept his part of the bargain.

A school teacher, who had known me, one day called at the office to complain against the execution department and his own lawyer. I gathered from him that he filed a suit against some school authorities for salaries due according to him and for dismissal without any cause which he considered wrongful. The suit was dismissed. Order of dismissal is drawn up as a decree. The order of dismissal in his matter was accordingly drawn up as a decree. That set the gentleman off. How could a dismissal be a decree or drawn as such became an obsession with him. This is sheer nonsense he argued. This seemed to shake his confidence on his one lawyer. He went higher up with petitions in his hand brushing aside accepted practice and procedure but without results. In the end he came to my

office for advice and help. My officers and myself were helpless as we found we could not carry conviction against the morbid persistence of his idea as he had not the will to have any. Subsequently I came to learn from some of my brother officers of the Court that the gentleman pursued the matter for years and refused to hear anything against his contention. He is still seen at intervals and is heard to say that a day will come when he may be able to drive home his notions on the subject to better minds to come. His quest for such minds is still continuing.

Only the other day a gentleman came in and enquired why he was not being summoned as a juror in a Sessions case. Amused at the episode, a member of the staff referred him to me. From the conversation that I had with him, during which I was a listener most of the time, I got some enlightenment on the criminal law of our land. He expressed that the Judges had no right to condemn a prisoner to death and the necessary authority to pass the sentence of death rested on the jury only. He wanted to serve as a juror to get the opportunity to give out to all concerned his reading of the law on the subject, which according to him, was only correct and the present practice is besides the law.

I had met a few others of the type, some of whom would say that interested persons were holding back the President's warrant appointing him as a Judge, some saying that such and such Judge worked as junior in his chamber when he was in practice and some would defile the system of dispensation of justice and so on.

The most interesting personality amongst the type I met, was a person endowed with certain special faculties. He spoke fluently on all subjects including law. He had great

aptitude for composing verses full of sarcasms. One day he came to my office in an agitated mood and started uttering "all bogus", "all bunkum". I kept quite and waited patiently to allow him time to cool off and offered him a glass of water. After he had finished his drink, I enquired what was the matter with him. I gathered that he appeared in a case in a court of law and could not succeed in his arguments before the same.

After he was pacified he started speaking as was usual with him. His sarcasms began. The topic on this occasion was focussed on the propositions of law. He criticised them adding that the propositions of law innunciated uptil now were good for nothing and started reciting the following doggerel :

"Law is Silly".

"The Act of Court cannot affect anybody
is know to all and everybody ;
The hand that enforces the said Act,
may tend to injure all and sundry.
Law is ever stricter towards the authority
who has to perform a duty discretionary ;
And it yields to none save the judiciary and
those who are untraced outlawry.
Having jurisdiction to try and hear, the
Court may go wrong' say the precedents ;
Opposite would be the case for the erring
humans,

who misread dubious judgments. °
Those who maketh law for some objects
and reasons, may not achieve the aim ;
'The language of the statute speaks for itself ;
so do the Mr. Justice proclaim.
Such is always the case with the laws
made by us the human herd ;
Laws delay, like the last straw on camel's
back,
denies justice and is tarred.

Best would be the lawyer who can what
meaning he likes give to it ;
Deception is the best amongst arts,
so long one can get on with it.
Silly it is as 'ignorance of it'
cannot make us escape from it strings ;
Law of the divine only is righteous
and it only solace to us brings".

If every man and woman gives out his or
her mind, the world would produce so many
novels as many men and women are there in
this world, so said Miss. Isadora Duncan.

One never knows if one would have behaved
in like manner as did the M. A., B, L., the
educated young man, the School teacher, the
prospective juror or the poet, had one been the
victim of the circumstances which befell them.

Ethics in Legal Profession

BY

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In Public life, a metamorphosis in political views is a phenomenon which may be necessary and justified under certain circumstances. A politician has to depend upon the votes of his constituency and if the people of his constituency change their views on an issue, its representative may conscientiously allow himself to be guided by the views arising from the new contingencies. But if the same representative without assessment of public opinion changes his views on account of expediency and self-interest he is described contemptuously as a political turn-coat. These opportunists who change their views according to political climate and rehabilitate themselves by clever manoeuvres in the shape of silencing the critics tactfully and of winning over important Political personalities create a sense of despondency in the minds of the thinking public who gradually begin to learn that consistency or constancy in respect of fundamental values of life does not work in the pragmatic world and, therefore, is neither desirable nor necessary. The result is that people far from building the character will gradually find it expedient to be characterless.

But sad will be the days when in the legal profession lawyers who happen to be an important section of the representatives of the intelligentsia would propound propositions of law not on the basis of their intrinsic merit or

from intellectual conviction but on the openly avowed object of serving themselves. This kind of unethical conduct may take various forms. The judges, lawyers, and jurists are dedicated to the cause of truth and if they deviate from these Ideal by expressing legal opinions on extra-legal considerations, it is impossible to establish justice. If justice fails, country fails. If crude egoism gets the upper hand and plays a dominant role, democracy cannot survive. Universal values are thrown to the winds and the hand of the clock is put back.

If a Judge delivers Judgment to please a particular Counsel ignoring the merits of the case before him, it will cause dismay and frustration in the mind of the losing party and his faith in the dispensation of Justice goes. Similarly, a Judge who invariably writes a Judgment to please or displease the authorities and invents reasonings for that purpose creates despondency among the members of the public. The public, thus, lose respect and confidence in the Temples of Justice which are essential for survival of democratic institutions. In the words of Justice Douglas let our Judges act in such a way that we all could say with pride—"our Court is an important part of that government an institution that has created in our people a confidence that the humblest and the most powerful will receive the same treatment". *

* "We the Judges" by William O. Douglas P-82.

An independent Bar is the hope of the oppressed and the suppressed and if the lawyers forget their mission to assist the Bench and mislead the Court by arguments *apriori* or by suppression of material facts, they would lose the respect of the Bench and the public including "the learned friends" in the profession. It is not rare that to prejudice the Judges often the relevant documents are not deliberately placed and wrong citations are casually made before the Court. Nor it is uncommon that lawyer for one party filing the difficultis or the absence of the lawyer of the opposite party at the time of the hearing of a case get a matter decided *ex parte*. It is also hailed as a great legal skill and dexterity to take the fullest advantage of the opponent's poor knowledge, ineffective advocacy, and weak presentation. This tendency among lawyers to win a case by hook or by crook may, for the time being, help their respective clients, but is certainly not in consonance with the high ideals to which lawyers are dedicated.

Similarly, a Jurist is expected to enrich Jurisprudence and make special contribution to particular branches of law by research on legal subjects and by analytical and Synthetical process of reasoning. He evolves new ideas which provide new thoughts to the thinking public. It is possible for a jurist to change or modify his views on the basis of new materials found by him. It is also possible for a scholar in law to write things which are Contradictory to what has already been formulated by him in the past. But the tragedy lies when a pseudo-jurist changes his views with the change

of the political condition of his country. There are writers who contribute learned articles with the sole object of pleasing the authorities who are in a position of rewarding them with mundane positions. They may create a spark here and there but the spark is not powerful enough to electrify the people in general. Those writings of course, fulfil their immediate object because the groups or persons for whom they cater, make a fuss over them and endeavours are made for trumpeting the intellectual attainments of such writers; but the din and bustle is silenced by subsequent writings and discourses which are based on sound juristic principles.

The greatest virtue of a nation is its character. If the *intellegentia* speak one thing and act differently, if the intellectuals allow themselves to be tools in the hands of the unscrupulous, if the learned sell their learning as a commodity to be measured and valued on worldly terms, the future of the nation is doomed. Fearless criticism, if necessary, has got to be made if the eternal values of life are not to be jeopardized. As Swami Vivekananda has stated, no noble thing can be achieved by cunningness. In these days of national awakening and preparedness the foremost duty of every Indian is to see that the ethical values are implemented in the social, political and administrative arena of the country. This can only be achieved if the individuals act in meticulous observation of our great religious and spiritual traditions. The resurgent India is crying with agony for rehabilitation of the ethical values. Shall we fail?



The Chinese Aggression X-Rayed

BY

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1962 will go down in history as the year which wrote the epitaph of communism in India, in the continent of Asia, and, judging from present indications, probably in the whole world. This is of course, a mere prophesy which draws its colour and content from the Communist China's wanton invasion of India, which, on all showing, is a peace-loving country whose, initial military reverses costing a few thousand of her innocent jawans in her encounter with the enemy shows her complete unpreparedness for war, which proves beyond doubt that this country and her Prime Minister live and practise as they preach. There are patriots among us who blame the Prime Minister and his cabinet for this complete lack of preparation for meeting the enemy across the borders ; they may be correct in their righteous indignation ; but one thing which they should remember, but which they evidently forget in the first flush of their patriotism is that out of evil cometh good ; that this total lack of military preparation has brought for the country an overwhelming measure of support and sympathy from all parts of the world, and has served to rouse world conscience in favour of India's cause, and to antagonise the nations against the Chinese demagogues, the usurpers installed in power in China today.

Long used to the communist propaganda that they can never invade others' territory

India had slept for the last 15 years much too complacent to realise the need for border defence. Till recently, many in India and outside could not bring themselves to believe that China had committed aggression. Even now it is quite possible that there are at least some people who still believe fondly and foolishly that no socialist country could ever commit aggression. To the non-Chinese world however invasion of India is a real fact stranger even than a fiction. It is the worst type of political blackmail of a friendly nation which, a co-sponsor of the Panch-sila, has steadfastly pleaded for China's membership of the United Nations. As a nation, although not a member of the United Nations, China ought to know that there are various means of pacific settlement of international disputes, which failing, resort to war or invasion of another's territory may be permissible. Evidently, war in the changed context of the world with the invention of nuclear weapons at the disposal of the two opposite camps ought to become obsolete to the saner section of the human race. But those who are lured by prospects of immediate gain fail naturally to see reason in methods of negotiation, resort to good offices and mediation, conciliation proceedings or other amicable means of settlement of disputes like arbitration. International Commission of Enquiry or judicial settlement through International Court of Justice. It is common

knowledge now that Prime Minister Nehru, in a letter to Prime Minister Chou-En-lai on January 1 (1963), has sought China's positive response to his suggestion made in Parliament to refer the Sino-Indian border dispute to the International Court of Justice. Mr. Nehru has also reiterated India's desire for a peaceful settlement of the boundary question, and has agreed to hold talks to this end when the Chinese aggression since September 8 last (1962) is undone. The next few days will probably reveal how the Chinese mind would react to these proposals of our Prime Minister. One small ray of hope for settlement of the dispute is just being held by the Colombo Powers' decision for conciliation proceedings which are going on at the present moment. But while optimism is good, and we must hope for the best, have faith in the six-nation Colombo Powers' good offices and good intention, we must surely keep our powder dry. And any slackening of war efforts will be not only criminal, but suicidal for the nation as a whole. War being ruled out as a means for liquidation of disputes between nations the Hague Convention for the Pacific Settlement of International Disputes laid emphasis on the need for frequent recourse to good offices and mediation by Powers. Article 33 paragraph 1 of the U. N. Charter also provides various means for pacific settlement of disputes between nations making it obligatory on the part of the parties to any dispute likely to endanger the maintenance of international peace and security to seek first of all "a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice." Articles 34 and 35 of the Charter further provide for collective mediation on the part of the U. N. whenever there is a "situation which might lead

to international friction". The situation that has developed concerning the Indo-Chinese disputes is certainly one which calls for collective mediation on the part of the United Nations.

Unfortunately, there is a feeling in certain knowledgeable quarters that because China is not a member of the United Nations, the United Nations is helpless to make her behave; but this is an absolutely wrong notion. The U. N. on the contrary casts inescapable obligation upon each and every member to see that there be no breach of peace in any part of the world, and if there occurs any such breach, to proceed straight against the defaulting nation irrespective of whether it is a member or not, and to help restore peace in the world by resort to means not necessarily peaceful in all context. It is clearly laid down in chapter 1 of the Charter of the United Nations that "The Purposes of the United Nations are :

1. To maintain international peace and security, and to that end : to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace ;;

And these purposes with their corresponding obligations are not surely confined to disputes or situation arising in the relations between members of the U. N. inter se alone but extend to disputes arising between a member on the one hand and a non-member on the other as well. For article 2 (Chapter 1) categorically provides inter alia that "6. The Organization *shall ensure* that states which

are not "Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

Verily, the Chinese invasion of India throws out the biggest challenge not only to us, but also to the USA, USSR and more importantly even to the UN, and poses a new threat to civilisation. This is fascism brought back to life. And the responsibility to fight it to its bitter end is surely a collective responsibility, not solely India's, which cannot be ignored without peril to the democratic way of life and living, without jeopardising all that is best in our civilisation. Obviously, India has to play a dual role in this crisis of human civilisation (a) as a victim of aggression (b) as an ex-officio member of the International Police Commission, so to say, which flows from her membership of the United Nations. As a victim of aggression she is determined to fight to the last to throw back the Chinese bandits beyond her borders. As a member of the U. N. she must play her full part to see that aggression is ended, peace is restored, world's balance of power remains undisturbed, as she did in the Congo.

Our participation in the Congo military operations shows that while we abhor war, welcome settlement talks, we are at the same time not averse to the use of force in all defensive warfare. The Chinese rejection of the U. A. R.'s mediation proposals, however, should not cause surprise in any quarters; for it is just in tune with their socialist expansionist dreams. In mediation, or arbitration proceedings one has to limit one's ambition for more and more; but socialism or communism is international in scope, and brooks no spoke on the wheels of its march towards world domination. For them there is no national

boundary line, no national sovereignty, no international law or morality. They are out to liberate the masses from the exploitation of the imperialist capitalist powers, conveniently ignoring the fact that the boot is on the other foot, that the so-called socialism is the worst type of monopoly capitalism backed by the political colossus, viz. the omnipotent state, offering a most cruel bureaucratic social structure where individuals do not count, where freedom is conspicuous by its total absence, where only the Upper Ten masquerading as the Trustees of the Nation rule ruthlessly over the mute millions of their countrymen. Like Machiavelli, to whom "the promise given was a necessity of the past, the word broken is a necessity of the present", the so-called communists feel they are perfectly free to flee from any obligations or any commitments made in the past. This is the type of men and women who rally round Chinese communism, otherwise known as Maoism, which, inflated by initial military successes threatens to revive Stalinism on the Asian soil. Victory in war, however, has always been the reward of superior moral forces. War is a battle between the forces of good and evil, and between moral and brute forces. All wars fought to date register clearly the ultimate triumph of the cause that was moral as opposed to the forces of evil. The Soviet Union making common cause with the allies in the last war bears witness to this stern lesson of history, which also must repeat itself in this unprovoked war imposed by the wily Chinese upon the peace-loving Indian nation. And the initial successes gained in war are no guarantee of final victory. Victory crowns not one who shoots the first bullet, but one who endures and survives initial reverses to shoot the last. And from present indications one is inclined to the view that

Chinese recalcitrance is sure to cause her total estrangement from the nations outside her charmed circle, drive the western powers to join hands as loyal members of the U. N. with India in this defensive war for preservation of democracy and civilisation, just to forestall further Chinese assault on other lands, to contain Chinese Jingoism which she falsely but purposely equates with world communism. And as far as one can predict, the U. S. S. R. will not fall back. Although political prophecies are meaningless jargons, it seems pretty certain that in the event of the West declaring war against the Chinese, the Soviet Union will repudiate her military pact with the invader nation, discard her neutrality, and join hands with the allies as she did during the last World War, when she was herself the victim of Fascist aggression on her soil. In the face of this mighty combination of forces, China will either retreat to her original position, or just invite her own doom, destined to go the way Hitler's Germany had gone as a result of the last World War. And if moral values have any meaning at all in shaping international relations, surely India can confidently count upon both the U. S. A. and the U. S. S. R. in her hour of need without departing from her policy of non-alignment to which she stands, irrevocably committed. It is a fact that China's relations with the Soviet Union are rather strained, not as cordial as between 'brothers' whereas events after the Cuban crisis tend to forge new friendly relations between the Soviet Union and the U. S. A., and the Western Powers for that matter. And in a dynamic world realignment of powers is quite natural, and should that happen there might occur a new polarisation of political forces with China and her mighty supporters like Albania, North Korea on the one hand, and the U. S. A., the U. S. S. R. and all the Western Powers on the

other. In the event of such a realignment of forces taking place the neutralist bloc comprising the Afro-Asian Powers and some nations of the Continent are most likely to join the non-Chinese bloc. And in such a context, one can, if one so likes, remain neutral, but that would be of little moment in influencing international relations.

Now, to understand Chinese expansionism it is necessary to view the Chinese military adventurism in the perspective of her national economy which presents a sad contrast to our own. Our growing prosperity has invited invasion on our soil as the tantalising standing crop attracts the cattle grazing in the nearby field. China on the contrary has a very poor standard of living, which results in her correspondingly high rate of fecundity leading to unrestricted population growth, which is now around 70 crores. Indeed, China moves in a vicious circle—a huge population to start with, a low fertility of the soil which gives a poor living standard, which causes high rate of fecundity, which again leads to expanding population. This population factor which is going soon to hit a century (100 crores) is, in the nature of things, bound to explode much sooner than the most dreaded atom bombs. This tyranny of numbers shapes the policy of the communist Chinese Government, and explains her increasing land hunger. But this naked truth about the Chinese policy and motives must require a sort of veneer to conceal the shameful reality of the situation, and that veneer, I need hardly explain, is the veneer of world communism of which China now pretends to be a major partner. China evidently is utilising the ideological flavour of Marxism just to conceal her own expansionist intentions, to bolster up her own claims to territories beyond her border, apparently, on the plea of liberating the common men, really to

plant her own expanding population in the territories already conquered, and included in the list of future adventures. The problem before the non-Chinese world, therefore, is whether to let China have the monopoly to populate the world all alone, weeding out the other races and nationalities, or to put a curb on her militarist zeal to set up the Chinese hegemony throughout the world, and to fix up by international decision a ceiling of population for her which China shall not exceed to endanger the safety, security, and peace and prosperity of the non-Chinese population including the American and the Russians as well.

Friends who mean well of both of us have suggested peaceful settlement of the Indo-China border troubles. But while we Indians welcome peaceful settlement of the problem we must make sure that the invading Chinese agree to go back to their original position as in 1954, leaving Tibet an autonomous buffer state between the two contending parties; for obviously that is the only basis for permanent, honourable settlement and for complete liquidation of the rancour and bitterness that beset the Indo-Chinese relations today. Surely Tibet must come to her own to provide a permanent guarantee of peace between China and this country. And this is a responsibility, not of India alone, but a collective responsibility flowing from the need for collective self-defence.

America's role in the protection of human rights and the democratic freedom of nations is well known throughout history, and needs no special mention. Her vital part in the last

World War really saved not only the Allies including the Soviet Union, but also the whole humanity from the tentacles of the Fascist octopus. America's ready response to our request for armaments is on record, which has laid the entire country under a deep debt of gratitude. Her liberal economic aid running into crores of rupees for the economic reconstruction of this underdeveloped country India can never forget. And at a time when our political freedom is assailed from quarters hitherto friendly to us, America's instantaneous response to our S. O. S. will go down in history as a gesture of extreme goodwill for a country encircled by enemies along her borders. A friend in need is a friend indeed.

Understandably, in the prevailing context of the wanton Chinese aggression Khrushchev's is a hard choice to make between the contending parties—one, an unscrupulous Stalinist, but militarily strong nation which openly challenges Soviet leadership in the communist world and the other most dependable both in peace and war, which is a firm believer in the principles of peaceful co-existence, whose foreign policy of non-alignment has even to this day * survived the mighty Chinese onslaught on the Indian soil. As the test of true statesmanship consists in genuine appreciation of the realities of the situation both actual and prospective, the Soviet Union will surely neither fail nor falter in choosing her allies to set the stage for a new realignment of powers, fighting a common menace out to endanger the peace and security of nations. Atom bombs in Chinese hands will mean total annihilation. Let the nations beware before it becomes too late.

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Is it Capital or Revenue ?

BY

J. L. BHATTACHARYA

In taxation matters one of the most vexing questions is—"Is the payment capital or revenue?" And in a given case all the authorities may be of little help. No infallible test has yet been laid down by any judge or jurist though the question has very often been debated before the Courts. It is all the more difficult in borderline cases. "There have been many cases which fall upon the borderline; indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons"—thus observed the eminent judge Green, M. R., in *I. R. v British Salmson Aero Engines Ltd.* [22 Tax Cases 29,43]. Then, again, the question has its two sides, one from the point of view of the recipient and the other that of the payer. A payment may be capital as far as the payer is concerned but it may spell revenue disbursement at the end of the payee.

The courts, in their attempt to distinguish between capital and revenue, have laid down important principles of law which give us useful guidance in deciding the question "Is it capital expenditure or income expenditure?"

1. Viscount Cave's Test—

The test which has been universally accepted rests on the famous diction of Viscount Cave in the leading House of Lords case *Atherton v British Insulated & Helsby Cables Ltd.* [1926 A. C. 205; 10 Tax Cases 155]. Viscount cave

said "When an expenditure is made, not only once and for all, but with a view to bringing into existence an *asset* or an *advantage* for the *enduring benefit* of a trade there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

In *Assam Bengal Cement Co. Ltd. v. C. I. T.* [(1955) 27 I. T. R. 34 (S. C.)] The Supreme Court considered in details all the leading cases on the subject and the tests which are usually applied.

The "asset" acquired may not be something material and may be something intangible or incalculable in nature. Then, again, the words "enduring benefit" do not mean 'permanent' or 'ever-lasting' but only indicate that the asset or advantage acquired should have enough durability to justify its being treated as capital: *Henriksen v Grafton Hotel* [1943 I. T. R. Suppl. 10]. The degree of durability will depend upon the facts of each case. The following cases are cited as illustrations.

(a) Keeping off competitors—

In *Assam Bengal Cement Co. Ltd. v. C. I. T.* [(1955) 27 I. T. R. 34 (S. C.)] The assessee-company, who were manufacturers of cement, leased for 20 years certain limestone quarries. In additions to the rent and royalty it agreed to pay certain sums annually as protection fees in consideration of which the

lessor was not to grant such leases to others in the area concerned. The Supreme Court held that the payment on the protection fees was capital expenditure. The company acquired by such payment a capital asset, the right to carry on its business unfettered by competitors. The payment increased the value of its business and made it more profit-yielding.

(b) Acquisition of 'rights' or 'Stock-in-trade' ?

In *Abdul Kayoom & Anv. v. C. I. T.* [(1962) 44 I. T. R. 689] The assessee-firm took on lease for 3 years the exclusive right and liberty to fish and carry away all chank (Conch) shells from a specified area off the coast-line in the Sea for a yearly payment. The question arose—"Was the amount spent for acquiring Stock-in-trade of the firm's business or was it spent for acquiring an asset from which it could collect its Stock-in-trade?" The Supreme Court held—" (But) it would be a straining of the imagination to say that the amount paid for reserving the coastline for future fishing was the price of chanks... That amount was paid to obtain an enduring asset in the shape of an exclusive right to fish and the payment was not related to the chanks."

Similar question arose before the Court of Appeal in *Stow Bardolph Gravel Co. Ltd. v Poole* [(1954) 1 W. L. R. 1503]. The assessee-company, in consideration for a payment took deposits of sand and gravel lying underground and acquired the right to work and win them. It was held that by the payment the company did not buy stock-in-trade readily identifiable but acquired certain rights to get gravel and sand which when excavate and possessed of would form part of the stock-in-trade.

(c) Cost of sinking pits in mines—nature of—

Payments for acquiring mining rights or for buying land for prospecting or mining are

clearly capital. "In a mine where minerals lie in deep underground strata and the whole of the mine can be worked from a single pit the cost for sinking it is capital. But in a mine where minerals lie at shallow depths or above the earth's surface (e. g. the coal-deposits in hills in the Jeypore coalfields in Upper Assam) and shafts or tunnels are very frequently to be driven the cost thereof is to be treated as revenue expenditure [*Movant v Wheal Grenville Mining Co.* 3 Tax cases 296, 302]. The reason is that in the former case there is enduring benefit arising from the expenditure but in the latter the benefit does not endure.

(d) Is it 'current repairs' or improvement of assets ?

Cost incurred for "current repairs" of business assets, e. g. plant, machinery, furniture, etc., is no doubt revenue expenditure. But difficulty arises where cost incurred on such assets appears to result in some improvement on them or to effect a change in the existing assets. If an expenditure renders a capital asset more profit-yielding, or improves its working capacity it is of capital nature. The test, again, is—has it brought into existence an enduring advantage? has it brought about a 'new asset' not identifiable with the old one?

In *Humayun Properties Ltd. v C. I. T.* [(1962) 44 I. T. R. 72] the assessee-company spent large sums of money for replacement of furniture, fittings and installations and for making the halls of their cinema-houses more attractive and comfortable. The expenditure which increased the value and running capacity of the existing assets was held by the Calcutta High Court to be on capital account. Bose J., observed—"The test, I think, depends on the degree of improvement brought about and the change effected in the identity of the existing assets as a result of the expenditure incurred."

An assessee-company who had their sugar manufacturing factory at a place frequently inundated by floods and without easy supply of quality sugarcane shifted their factory to another place with definite advantages both as regard immunity from floods and availability of sugarcane. The cost incurred for dismantling, transporting and re-erecting the factory was held by the Patna High Court to be of capital nature. The Court rested its decision on the ground of the assessee's acquiring two enduring advantages, viz. immunity from floods and ability to obtain quality sugarcane [Sitalpur Sugar Works Ltd. v C. I. T. ; (1961) 41 I. T. R. 796].

II. Lord Haldane's Test—

In the leading House of Lords case *John Smith & Son v Moore* [12 Tax Cases 266, 282] Lord Haldane laid down another test based on the economist's differentiation between fixed and circulating capital. He said—"Fixed capital is what the owner turns to profit of by keeping it in his own possession; circulating capital is what he makes profit of by parting with it and letting it change masters." His test is that an expenditure which is referable to fixed capital is of capital nature and an expenditure which on the other hand, is referable to circulating capital is revenue in nature.

Brokerage paid in connection with the purchase of a business concern or a capital asset is capital as the payment is referable to fixed capital; but brokerage paid for buying stock-in-trade of business is or revenue account as it is referable to circulating capital.

The test was approved by Lord Hanworth in *Anglo-Persian Oil Co. v Dale* [(1932) 1 K. B. 124, 138]. and in *Golden House shoe (New) Ltd. v Thurgood* [(1933) 18 Tax Cases 280].

An assessee bought a colliery and agreed

to pay a lump sum to the vendor and further, a commission at a fixed rate on every ton of coal raised in perpetuity. The payment of the commission which was referable to the assessee's turnover (is the assessee's circulating capital) and was not tied down to any fixed capital sum, was held as revenue disbursement [C. I. T. v Kolhia Hirdagarh Co. Ltd ; 1949 I. T. R. 545].

Lord Haldane's test. Though suitable in some cases cannot be universally applied. It has certain inherent drawbacks. To apply it one has first to determine the nature of the asset involved and that may lead to difficulties. *Romer, L. J.*, said in *Anglo Persian Oil Co. Ltd. v Dale*, cited above.—"Unfortunately, however, it is not always easy to determine whether a particular asset belongs to the one category or the other. It depends in no way upon what may be the nature of the asset in fact or in law. Land may in certain circumstances be circulating capital. A chattel or a chose in action may be fixed capital. The determining factor must be the nature of the trade in which the asset is employed."

Then, again, costs incurred for maintaining or preserving capital assets are, on sound principles discussed later, revenue expenditure but such expenses according to this test is capital for they are referable to fixed capital.

III. Doctrine of Maintenance or Preservation of Assets—

Capital outlay for the acquisition or initiation of a business is capital disbursement as it sets the profit-yielding machinery in motion. But it is now well settled law that an expenditure for maintaining or preserving such machinery is of revenue character. A few typical case-laws are discussed here.

In *southern vs Borax Consolidated Ltd.* [1942 I. T. R. Suppl. 1, 5] the assessee—company incurred legal expenses for defending its title to its assets. The expenses were held to be of revenue nature because they did not create any new asset but were incurred in the ordinary course of maintaining its assets. Justice Lawrence said—“...if no alteration is made in the fixed capital asset by the payment, then it is properly attributable to revenue, bring in substance a matter of maintenance, the maintenance of capital structure or the capital asset.”

In *Morgan v Tate & Lyle Ltd* [35 Tax Cases 367] the assessee-company incurred expenses in propaganda campaign to counteract threat-end nationalisation of its business and to prevent seizure of its industry. The House of Lords held the expenditure to be on revenue account on the ground that it was incurred merely for the purpose of “preserving the very existence of the company’s trade” and to enable the assessee to carry on its business and earn profits.

In a very recent case *C. I. T. v Royal Calcutta Turf Club* [(1961) 41 I. T. R. 414] the Supreme Court considered some important authorities on the subject and laid down the principle that an expenditure incurred not for creating any asset or advantage of an enduring nature but for merely preserving the assessee’s

business or its assets would be a revenue disbursement.

The above principle has been extended a little further in some cases wherein expenses for removing difficulties in carrying the business has been held as income disbursement. Cost to disembarass the assessee of an onerous agreement [*Anglo Persian Oil Co. Ltd v Dale* ; 16 Tax Cases 253], payment to an undesirable director to get rid of him [*Noble v Mitchell* ; 11 Tax Cases 372] and expenditure to terminate a trading relationship to avoid future losses [*G. Scammell & Nephew Ltd v Rowles* ; 1940 I. T. R. Suppl. 41] have been held as revenue expenditure.

There are other tests given by the courts but it will not be incorrect to say that most of them veer round to Viscount Cave’s test. Chagla, J. in *C. I. T. v Century Spn. Wvg & Manf. Co. Ltd.* [(1947) 15 I. T. R. 105, 116] said—“The legal touchstone which is almost invariably applied is the familiar dictum of Viscount Cave in *Atherton’s case*.....”

In conclusion I shall quote Lord Macmillan’s observation in *Van Den Bengeh Ltd. v Clark* [(1935) A. C. 431]—“My lords, if the numerous decisions are examined and classified, they will found to exhibit a satisfactory measure of consistency with Lord Cave’s principle of discrimination”

The Indian Police Act. 1861

BY

PROF. TAPAS KUMAR BANERJEE

Before the British came to India, and indeed for a considerable period after the commencement of British rule, the idea of a separate regular police force, charged solely with the function of prevention and detection of crimes and the apprehension of criminals had never been thought of. In fact it was only in 1774 that Warren Hastings introduced, for the first time under the East India Company's rule, several measures of police reform. These were the first of a series of reforms culminating in Act V of 1861, which gradually gave the police of Bengal the modern shape and structure.

In 1765 the East India Company had acquired the *Diwani* of Bengal Bihar and Orissa, and had thereby incurred the responsibility for the revenue administration in that territory. This naturally led the Company to look after the safety and welfare of the people who had thus come under its care and caused it to take an active interest in the suppression of violent crime. In 1769 when the English Supervisors were appointed they were instructed to take into consideration "the number, distribution, and pay of the darogahs, cutwalls and pykes", and to keep an eye on these officers, so that they could not illegally exercise any power or extort any money. Nevertheless, till the year 1774, the Company did not interfere with the police administration of the country. The old Mughal establishment of Police continued during this period under the

control of the *Nizamat*, which remained a responsibility of the Nawab's government. Under the Mughal system the police in the towns of Dacca and Murshidabad was under the charge of the *Kotwal*, whose administration of the police though harsh, yet appears to have been sufficiently effective to maintain peace and public order within those towns. His principal function was to keep watch in towns and to bring offenders to justice. He divided the town into *mahals*, and placed as officer in charge of each *mahal*. The duties of the *Kotwal* were various. He was to be particularly careful to maintain night patrols in such a way that the inhabitants might sleep at ease and the activities of the wrongdoers might be prevented or frustrated. He was directed to appoint two persons to spy upon the activities of each *Meer Mahal* (i.e. the preventive officer of charge of each *Mahal*), one being a resident of that *mahal* and the other a stranger. He was to discover thieves and the goods they had stolen; and if he failed to do so, he was responsible for the loss. Over and above these and other police duties, the *Kotwal*, had also to perform numerous municipal functions. In fact, he was the Superintendent of the town police and Municipal officer "rolled into one".

In the field of rural police there were two different organisations which worked together in harmony to maintain the peace and order of the country. One was the establishment of the *Faujdar* representing the might of the Mughal

Emperor. There were a number of these officer in charge of several pargannahs, under the Nazim or Governor of a province. The *Foujdar* was primarily a revenue official, but he was responsible for keeping the peace and coping with bands of highwaymen, rebellious chiefs, and other unruly persons. To help him in his police duties the *Foujdar* had a number of subordinate officers called *thanadars* who were posted at every *thana*. Each *Foujdari* jurisdiction in Bengal about the year 1765 seems to have been quite large. In case of emergency, the *Nazim* or in case of need even the Emperor himself, would send troops under his generals or Royal princes to help the *Foujdar*, in maintaining law and order. It should be noted, however, that the police activities of the *Foujdar*, as well as of the *thanadar* were limited to intervening with military force when widespread violence or rebellion should compel them to do so. They never bothered themselves with ordinary crimes which was the affair of the local people.

The other organisation was the *Zemindary* establishment. The *Zemindar* was entrusted with the charge of maintaining the peace of his *Zemindary*. In his official engagement, he was bound to apprehend murderers, robbers, housebreakers, and generally, all disturbers of public peace. If he failed in producing the robbers, or the thing stolen, he was answerable to the injured person to make good the loss. Every *Zemindar* maintained his own police establishments, but of these no clear or distinct account is to be found in the records. Nevertheless it is at least certain that these were of two descriptions. The first consisted of persons passing under the names of *Dusauds*, *Pasbauns*, *Ghorites*, *Nogabauns*, *Harees* etc., who were immediately and permanently connected with the villages, and acted under the authority of the head inhabitants. They were

a very ancient institution, driving their origin from the early periods of Hindu Government, and like the head inhabitants under whom they acted, were employed both in the business of rent collection and in the preservation of the peace within their respective jurisdictions. In their capacity as police officers they guarded the crops of the ryots from depredation; they had charge of the stocks; and they served as guides and protectors to travellers passing from one village to another. It was to collect information in their neighbourhood their duty also of offences committed, and to report suspicious persons who entered the village.

The *Pykes* or *Chokeydars* formed the other branch of the *Zemindary* police. Their duty was almost exclusively confined to the apprehension of offenders and the prevention of the breaches of the peace. They, as well as the former, were maintained by grants of rent-free land, or land at low rents; "but they did not, it is believed, like the *Dusauds & Co.*, form an integral part of the constitution of a village community nor receive contributions from the inhabitants; they were District rather than village servants, being of the nature of Police Militia Bands".

Besides these usual establishments of guards and village-watchmen, maintained for the express purpose of performing police duties, the *Zemindar* had the aid of the *Zemindary* servants, who at times numbered several thousands, who were at all times liable to be called forth in aid of the Police.

Both types of village police were considered village officers, and as such, received a certain provision conjointly, from the *Zemindar* and the villagers. From the former they had allotments of land, and from the latter certain fees, either in money or in kind, on all public occasions like *pujas*, weddings etc. Thus

sufficient support was secured to them to maintain themselves and their families, in comfort and respectability.

The system probably worked well so long as the Central administrative machinery was strong and efficient. But the anarchy which prevailed during the decline of the Mughal Empire destroyed the harmony, and gradually the *Zemindars* tried to be independent of the *Foujdars*. Under the early Nawabs of Bengal the system was not very much disturbed. But taking advantage of the Maratha invasions and other contemporary troubles in which Aliwardi Khan was involved the *Zemindars* became ruthless. In 1773 far from maintaining the peace and order of the country, they themselves too frequently protected the criminals, if they were not themselves the actual perpetrators of criminal activities.

Thus while the *Zemindars*, instead of fulfilling their obligations, themselves became lawbreakers, the Nawab's police force was reduced to insignificance. Already in 1765 it was to a great extent reduced. In December, 1770 it was further reduced by the recall of the *Foujdars* except from those districts which were adjacent to the factories of other European powers. On the other hand, the Company's police forces were not sufficient either.

However, the dismissal and arrest of Muhammad Reza Khan in April, 1772, and the abolition of the office of *Naib-Nazim*, created a vacuum in the police administration of the country. For it was the duty of the *Naib-Nazim* to issue all orders and directions as regards the police of the province. On the 23rd November, 1773, the administration of criminal justice and police formally came under the personal supervision and control of Warren Hastings, and it continued till the 18th October, 1775.

When Hastings took charge of the police the country was practically in a state of chaos and confusion, most of which arose from the insufficient, or else inefficient police system. Hastings found out that one of the main causes underlying the lawlessness of the country was abolition of the *Foujdary* jurisdiction and of the *thanadar*ies dependent on it, for after its removal no other means was substituted for giving intelligence to the Government of such events as related to the peace of the country. Secondly, the method of land settlement by auction introduced in 1776, resulted in many outsiders becoming revenue-farmers. Although the responsibilities of internal police were imposed on the new auction-purchasers, yet as their engagements were only for 5 years, no serious interest could be expected from them, except in fleecing the ryots as much as they could. On the other hand it had the effect of crippling the authority of the *Zemindars*, and suppressing the interest they might have taken in the peace and order of the *Zemindaries* which they had held for generations. Thirdly, the resumption of *Chakera* lands or lands allotted to the *thanadar* and *pykes* for their service in guarding the villages and large districts against robbers, deprived many people of their livelihood and turned them *dacoits* and provoked them to commit other crimes.

In 1774, Hastings proposed that *Foujdars* should be again appointed and that *Zemindars*, farmers, and other revenue officers were to be instructed to afford the *Foujdars* all possible assistance in the discharge of their duty and to obey their orders. The farmers were to make over to the *Foujdars* the land servants allowed for their respective district who were to be under the absolute command of the *Foujdars*. The *Chakaran* lands were to be given back to the *thanadars* and *pykes*. The

help of the land-owners was to be secured by the threat of penalties for failure to comply with just demands of the Foudars. And lastly, in order to supply the want of some sort of central control, a separate office was to be created under the authority and control of the President of the Council for receiving and registering all reports from the different *Foujdars*, and issuing orders to them.

But it seems that the *Foujdars* did not get the help from the *Zemindars* and tax farmers, which was expected from and demanded of them, in the plan. In any event, before the plan put forward by Hastings could proceed, for financial reasons, beyond four *chucklas*, Muhammad Reza Khan was re-installed as Naib-Nazim on 18th October, 1775. So, naturally, the police administration again came under his control. He has to draw up a better and more effective plan for the police administration.

The plan which Reza Khan made for this purpose was adopted in January 1776, and continued till 6th April 1781. This plan was simply an extension of the plan of Hastings adopted in 1774. It provided for a *Foujdari thana* at the chief town of every large district. Districts having larger jurisdiction were allotted a certain number of *chowkies*, or inferior police station. Under this new plan 26 *thanas* and 24 *chowkies* were established in all. To control the whole organisation, a central *foujdari* office was established at Murshidabad under the personal supervision of the Naib-Nazim. Over and above these *foujdari thanas*, there were *Zemindari thans* over which the Naib-Nazim had the superintending power. Moreover, apart from these ordinary police forces the plan provided for additional troops to be supplied by the Company to answer special needs.

But the defect lay in the fact that although the *Zemindars* and farmers of revenue were directed to conform to the orders of the *Foujdar*, and to assist him in the discharge of his responsibilities with all their resources, yet in the event of neglect or disobedience of his orders the *Foujdar* could not exercise direct pressure upon them. He could only report their conduct to the higher authorities and it was the Governor General and council alone who could exercise the authority necessary to reduce them to subjection.

In 1781 it was found that establishment of *Foujdars* and *Thandars* which was intended for the preservation of the peace did not produce the good effects intended by it—the *thanadars* being often in league with the dacoits. So the Nawab was requested to recall all those officers, excepting the *Foujdar* of Hugly who was to continue, because of the special nature of his office.

To fill the gap, the judges of several *Diwani Adalats* and certain *Zemindars* were invested with police powers and they were given concurrent jurisdiction for the apprehension of all criminals. They were required to assist and act in concert with each other whenever necessary; and they were also, jointly and separately, to afford similar aid to the *darogahs* of the *Foujdari* courts who were also continued in their authority of apprehending criminals subject to their jurisdiction.

In 1782, by a Proclamation, Hastings stressed the responsibility of the *Zeminders* to discharge their police duties properly under pain of severe penalty. But the nature and extent of the *Zemindar's* responsibility was not properly defined. Another main defect of the provisions of 1781 was that the power of the English magistrates over the *Zeminders* and other landholders was inefficacious, weak, and uncertain.

The real reform of the Police was started by Lord Cornwallis. The clause of the land-holders and farmers of land, by which they were bound to keep the peace, and in the event of any robbery being committed in their respective estates or farms, to produce both the robbers and the property flundered, he found not only "nugatory, but in numerous instances the means of multiplying robberies and other disorders from the collusion which—subsisted between the perpetrators of them, and the police officers entertained by the land-holders and farmers of land".

In 1790 the magistrates were called upon to report to Government on the Police. Many of them suggested that the Police should be put under the charge of the magistrates; instead of the Zemindars, and that the *Thanadars* should be appointed and paid by the magistrate. But nothing was done till 1792, although from time to time the magistrates of certain places would send reminders stressing the need of enforcing those proposals. On December 7, 1792, a Regulation was made by which the police of the country was placed under the exclusive charge of Government officers specially appointed for that duty. The landholders and farmers of land were required to discharge their police establishments and were prohibited from entertaining such establishments in future. They were at the same time relieved of responsibility for the maintenance of peace and police duties. 1805—1817 : *Police Regulations Consolidated.*

The reforms of Cornwallis were, no doubt, remarkable and salutary and in the right direction, as far as making Regulations were concerned. But their practical application left much to be desired. In the reforms stress was laid more on "the abuse that had been experienced of the authority in question entrusted to the *Zeminda s*, than on the means

which might have been found for restoring and applying it, to the public benefit.

The period between 1805 and 1817 is one when Police Regulations were consolidated. In 1805 some of the Zemindars who "from their qualifications and character might be considered deserving of confidence and disposed to make a proper use of the "power, were again invested with police powers. Provisions were also made for granting commission to respectable Indian inhabitants of the several districts, authorising them to act as honorary Amins or Commissioners of police, whose office was something of the nature of that of the Samadars with limited authority working under the Darogahs.

Thus the Government reverted, at least partially, to the practice of which in 1793 it had disapproved; Semindari help in police administration was sought after for the protection of the people and the apprehension of the public offenders. But because of the reduction of the efficient influence of the landholders the scheme became a complete failure, and the respectable inhabitants thus appointed were found to have "Countenanced and supported dacoits" and other bad characters.

In 1808 the Government resolved that the appointment of a Superintendent of police would help in collecting and concentrating information obtainable from different parts of the country and in making possible extensive police operation against dacoit gangs. So a covenanted servant of the company was appointed the Justice of the Peace for the City of Calcutta, Magistrate of the 24 Parganahs, and Superintendent of Police. In his capacity as the Superintendent of Police he possessed a concurrent jurisdiction with the several Zilla and City Magistrates in the divisions of

Calcutta, Dacca, and Murshidabad. He was to act directly under the Judicial Secretary and also to be under the general authority of the *Nizamat Adalat*.

Regulation X of 1808 stressed the responsibility of the general public for the apprehension of dacoits and towards that end it established personal security and indemnity, together with suitable rewards for such persons as might afford active assistance and it prescribed adequate pains and penalties for those who in spite of possessing the means of affording assistance did not render it to the police. In 1809, Mr. Secretary Dowdeswell submitted a special report on the police in Bengal. He pointed out that the plan of Amins of police had totally failed and as people were unwilling to accept these honorary office in most districts they were non-existent. He pointed out the corruption and inefficiency of the darogahs and suggested that they ought not to be allowed to interfere in petty and bailable offences and were to confine their activities to cases of breach of peace and serious affrays and heinous crimes. As regards the Superintendent of Police he pointed out that it was impossible for one man stationed at Calcutta to supervise properly the whole police administration. He suggested the appointment of certain additional European officers as Superintendents of police, and proposed a certain amount of communication and co-operation between them and the the magistrates.

Following Mr. Dowdeswell's report several regulations followed during the period between 1810 and 1817. By these regulations severe penalty was imposed on landholders neglecting to give immediate information of habitual robbers on their estates or if they gave actual assistance in harbouring such robbers. The active functions of the darogahs were restricted

to the maintenance of public tranquility and apprehension of offenders of serious crime and habitual bad characters. Town Chowkidars liberal rewards for information. Three superintendents of police were appointed for the distant divisions of Patna, Benares and Bareilly. The office of Kotwal was abolished and darogahs were appointed in their stead. The power of appointing and removing Indian police officers including chowkidars, was restored to the magistrates.

In 1815, Lord Moira made a thorough enquiry into the existing police system in Bengal, Bihar and Orissa. On the reports of the Magistrates wrote that the thanadary system had failed as a force adequate to the protection of the community or prevention of crime. But in his opinion protection or prevention was not the object of introducing the thanadary system. Those duties were left with the Zemindars and the thanadary system was introduced to see that the Zemindars did not abuse their power and authority in these respects, and so far as this was concerned he thought that the thanadary system was a great success, and he recommended its maintenance. He also recommended the continuance of the village police system in the existing form. He also emphasised the importance of co-operation and material help, direct or indirect, between the police and the public which did not exist in Bengal.

As a result of the enquiries by Lord Moira regulation XX of 1817 was made which consolidated the provisions of the existing police regulations and specified in detail the various kinds of duties to be performed by police officers. It was a fairly comprehensive police code and this remained in force with minor alterations till 1860. Under these regulations the magistrate was made the head of the police

in his district with powers of appointment, promotion, transfer, removal, and other disciplinary powers. No police officer was allowed to trade or employ subordinates in private work. The village chowkidars were brought under greater control and in closer touch with the thana officers, and they were to obey the orders of the police darogahs and to report to the thana all occurrences.

The *Zemindars* and other headmen of the villages were made liable to punishment for refusing to assist the police in the detection of crime and the apprehension of criminals.

The method of appointment and the pay of the village watchmen, however, remained untouched, as a result of which they were subordinated to dual authorities—to the *Zemindar* because they lived on the *chakeran* lands allotted by them and to the darogahs because they were responsible to them under the Regulations. And so long as the chowkidar continued to be the servant of the *Zemindar*, the latter had it in his power to suppress offences from the knowledge of the magistrate, to screen offenders, to mislead the courts by tutored evidence, and to exercise secret influence against which the magistrate fought in vain. During the period 1818 to 1828 some minor changes were effected. In 1829 the office of the superintendent of police was abolished and his powers were given to the commissioners of revenue and circuit. The impropriety of this measure was soon detected and in 1837, the office was reintroduced with its former powers and duties.

We have a faithful account of how the system of 1817 with the subsequent modifications worked, and of the defects and inconveniences that were detected during the actual working of this system in the writings of Frederick John Shore. The writer had personal

knowledge of the system as he was himself in the service of the Government in the capacity of District and Sessions Judge. He pointed out that because of the extensive jurisdiction of each thana being intercepted by rivers, investigation was so delayed that the clue to the detection of offenders was lost.

There was no uniform rule. Police officers in some places were vested with extraordinary powers and in others unnecessary restrictions were imposed on them. The pay of police officers was very low and as a result they were corrupt and wherever they got an opportunity they abused their powers and extorted the public. For improving the police he suggested better pay and proper and alert supervision over the darogahs by the magistrates. He also recommended rewards and promotions for good conduct among the police officers.

The Select Committee Report of 1832 showed that the subordinates in the police department were corrupt, inefficient, and oppressive, while the superior officers, owing to the burden and multiplicity of their duties, were not able to exercise an adequate supervision. Parliament in England passed an Act in 1829 for reforming the police in London, the Court of Directors of the East India Company wrote a letter in 1836 to the Government of India that "no financial consideration should be allowed to stand in the way of a change so urgently required".

Sir Charles Metcalfe drew up a series of questions which were circulated throughout India, and in 1838 a Committee was appointed to be presided over by Mr. Bird, for considering the replies and for drawing up a plan for the reformation of the police in Bengal. The Committee referred to the "extreme unpopularity of our system, and the grievous oppressions connected with its operation". The committee

also referred to the corruption of the darogahs and their subordinate officers.

The Committee found five causes of the inefficiency of the police. Firstly, there was the want of uniformity due to want of co-ordination between the different commissioners of revenue and circuit who had been charged with the duties of the Superintendents of police since 1829, when the latter office had been abolished. Secondly, there was the union of the offices of Collector and Magistrate which led to the neglect of magisterial and police duties in favour of revenue duties. Thirdly, the officers were frequently transferred. In the fourth place, there was the want of intercourse between the European and the Indian communities. Lastly, there was the great extent of the magistrate's jurisdiction and consequent absence of the control over the thanadars which made the latter all-powerful and corrupt.

The corruption of the *thanadars* was easily understandable. Their outside duties were considerable, their salary was inadequate, and they had no prospect of promotion. Their frequent dismissals led to want of confidence in their security of tenure and therefore the daroga made all he could within the period of his office. The Committee found that the *Chowkidars* were generally admitted to be thieves and that nothing could be in a worse state than the chowkidari establishment. The Committee considered that one difficulty the village police had to contend with was the total absence of all rules or Regulations concerning their duties, powers, and obligations.

The difficulty was that no improvement was practicable without considerable expense which the Government was not in a position to incur. The Committee recommended the introduction of three grades of darogahs and that the

darogahs were to be made secure from ill-treatment by magistrates and suggested a chain of promotions from *Barkandaj* to *darogahs*.

Regarding the village police the Committee thought that the force should be reconstituted, rules of conduct defining the powers and responsibilities of the village authorities to whom the watchmen were to be subordinated were to be framed and the watchmen were to be properly remunerated.

On this report of the Bird Committee Sir F. J. Halliday wrote a separate minute which is of much importance as the writer had a wide experience in Bengal and in its administration.

He did not think that the proposals of the committee went far enough. He agreed that the most prominent defects of the existing system were the union of executive with judicial functions and centralization of administration. He put forward a separate plan of his own, in which one of his suggestions was that there should be a separate police force with a Superintendent and an Assistant Superintendent for each district. The recommendation committee of the concerning the separation of judicial and executive function was accepted. But Sir Frederick's recommendation for a Superintendent of police was not put into practice for a quarter of a century.

Nothing was done for the improvement of police in Bengal till 1856, when Sir, Fredrick Halliday, the Lieutenant Governor of Bengal wrote a long minute on police and suggested certain reforms. He stressed in details the point that the salary of the police men were notoriously inadequate and so bribery and extortion were almost a necessity and had long been the habits of their lives. He recommended an increase in the salary by a system of gradation.

Regarding the village Police Sir Frederick pointed out that it was diminished in number, and impaired in efficiency, while its rights had been seriously and successfully attached and undermined. To crown all, their pay was inadequate and uncertain. Hence they were all thieves and robbers or leagued with thieves and robbers so much so that when any one was robbed in a village it was most probable that the first person suspected would be the village watchman. Yet it was felt that no police could be effective without their help. To secure an effectual improvement of the police in the lower provinces of Bengal Sir Frederick suggested the adoption of certain measures. First, the character and position of the village chowkidars and watchmen were to be improved. Secondly, an adequate salary was to be paid to the stipendiary police and a few considerable prizes were to be awarded to darogas in the shape of increased salary for particularly distinguished service. In the third place he suggested the appointment of more experienced officers as covenanted Zilla Magistrates. Fourthly he suggested a considerable increase in the number of the uncovenanted or deputy magistrates for keeping the police under closer superintendence. The justness and propriety of most of these recommendations were admitted by the court of directors, they traced the defects to the lack of adequate control and supervision by the English officers in charge of the police and to the inadequate pay given to the Indian police officers. As remedies for these evils the Court suggested that no Indian officer was to be entrusted with the double functions of police and land-revenue, although the magistrates were to retain their powers as collectors. Secondly, the management of the police of each District was to be taken out of the hands of the magistrates and was to be committed to

European officers, "with no other duties, and responsible to a general Superintendent of police for the whole presidency". Lastly the Indian police was to be given higher pay, security of tenure and prospects of promotion. The Court also recommended the division of police into two separate sections, "the preventive and detective", each having its own functions, and each organized upon the most efficient plan. It also thought that the size of the districts should be reduced as much as possible. Finally, the Court directed that the police of each Presidency or Lieutenant-Governorship should be "organized as far as possible upon a common plan for all India".

But the mutiny came and nothing was done in this direction till 1890 when a Police Commission was appointed to undertake the drafting of proposals on these lines. The Commission was directed to enquire in detail into all the departments and branches of the police in India. Secondly, they were to suggest alterations in the system which they considered likely to increase efficiency, or to diminish expense. The suggestions were to be practicable within some reasonably proximate period under the existing situation. In a Memorandum the government laid down certain broad principles which the Commission were to keep in view. The principles were as follows: (1) the police should be entirely subject to the civil Executive Government (2) The duties of police should be entirely civil, not military. (3) The police should be confined to catching offenders and procuring the attendance of witnesses, leaving it to an entirely distinct agency to examine the witnesses, and take down in writing their depositions. (4) The organization of the Police must be centralized in the hands of the Executive administration. (5) The organization and discipline of the police should be

similar to those of a military body, (6) The appointment and dismissal of every policeman should rest with the European officer to whom he was immediately responsible. (7) Police were to be divided into various bodies differently armed and equipped, according to the different kinds of work required of them. (8) The pay of the police was to vary according to time and place, but it was to be laid down as a general rule that it should always be sufficient to give the policemen something more than the highest rate of wages for unskilled labour, so as to ensure that the government had the pick of all the classes to which unskilled labourers belonged, thus securing the best and most respectable of that class for the police. The pay of mounted policemen, and of the superior grades, was to be higher according to their expenses and rank. (9) The police should always have a uniform dress. (10) The arms of the police were to vary according to their duty. (11) The direction of the whole interior economy of the police was to rest exclusively with the higher officers of police. (12) There was not to be more than one police system in one locality. (13) Where practicable the personnel of the police were to be drawn from the country in which they were to serve.

The Police Commission investigated the matter and unanimously adopted the following principles as the basis of the police system which they proposed. The "Executive Government should at once constitute a civil force of such organization as shall make it thoroughly useful for every Civil Police purpose. The force should be so trained and constituted that it may be thoroughly relied upon for the performance of all duties of a preventive and detective police, and for the protection of property, and maintenance of local peace and

order, with reference to the locality in which it is to be employed. That the formation of such a force is the key to economy and Military efficiency". The Commission observed that "the duty of supervising the Village Police in all their public duties should devolve on the District Superintendent, which the view of securing a regular and punctual performance of those duties, and for making the village watch an usual supplement to the organized constabulary".

There was not to be any separate detective branch of the police and every part of it was to be held responsible for every duty, preventive and detective, properly belonging to it.

The police thus constituted was to form a separate department in each local Government of local administration, under the immediate authority and control of its chief. And, having an independent departmental organisation and subordination of its own, it was to be made an efficient instrument at the disposal of the District officer.

The Commission recommended that the police under each local Government should constitute one force under an officer called Inspector General of Police to whom was to be vested the organization of the establishment and the responsibility for maintaining it in a state of efficiency, by giving proper attention to its discipline and interior economy, and to the general management of the force through its own officers. In every District under the jurisdiction of the magistrate there was to be a Superintendent of Police, an European officer who was to be departmentally subordinate to the Inspector-General of Police. He was to be bound also to obey the orders of the District Magistrate in all matters relating to the prevention and detection of crime, the preservation of the peace, and other executive police duties,

and was to be responsible to him for the efficiency with which the force performed its duty. On him was to devolve the command and control of all the establishments of police of every denomination within his District. No police officer, of whatever rank, was to have any judicial power. The police were not to be used as an agency for the recording of any evidence, confession, inquest or the like. But a system of keeping faithful, accurate, and minute diaries was to be introduced. These diaries were to specify, concisely, but in detail, all duties in which any police officer might have been engaged, and every occurrence and information that might have required his attention. All police officers engaged in specific detective duties were to keep an accurate and minute diary of every step taken, and every information obtained in investigating a case. Such diaries were to be police documents only, and were to be sent to the District Superintendent, although always to be open to the inspection of the District Magistrate.

The police were strictly forbidden by law to take cognizance of, or to interfere with, petty offences of any description, or otherwise to interfere with liberties of the people.

As regards the Village police, the Commission thought that the institution must be maintained, but in an efficient and remodelled form. In the existing condition of the interior of the country the organized police could not be informed of all that occurred of public consequence unless they had some tolerably

reliable agency in the villages. It was felt necessary that there should be some one among the residents of the Village on whom the organized constabulary could rely for information and through whom they could carry out their orders. The Village watchman was just such a person. The Commission thought that the local and popular character of the Village watch should be preserved and that the Village watch should be rendered efficient for local police service.

Finally, the Commission stressed the necessity of a careful review of the position of the Village police, of defining the beat of each watchman, of declaring the terms of his appointment and succession, and of fixing remuneration, on which the success of the reforms of the general police so much depended.

On the basis of these recommendations of the Police Commission, on 29th September, 1860, a Bill was introduced by Sir Bartle Frere which was subsequently passed in 1861 as Act V. The sections of this Act referring specifically to the organization and control of the police are fewer than twenty in number. Moreover, they were intentionally made general in their wording, and details were carefully avoided, so that there could be scope for the Indian Police system to expand in response to ever-changing conditions. The structure of the police organization, however, that was laid down in 1861 is substantially the same today.

Some aspects of Woman's Estate in Hindu Law

BY

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In the Smṛiti period there is very little authority in support of the theory of limited or restricted estates for Hindu women. The texts of Manu, Yajñavalkya, Viṣṇu and Bṛhaspati recognise widow, daughter and mother as heirs but nowhere these texts make any distinction between the estate taken by them and the estate taken by a male heir (a). There are, however, some texts which may negative this implication of absolute right of Hindu women over the heritage. Thus, Katyāyana says,

অপুত্রো শযনং ভর্তৃঃ পালয়ন্তী গুরৌ স্থিতা ।

ভূক্ষীতামরণং কান্তা দায়াদা উর্দ্ধমাশ্রয়ঃ ॥

—A sonless (widow) keeping unsullied the bed of her lord and abiding by her venerable protector, shall, being moderate, enjoy her husband's estate until death, afterwards the heirs shall take" (b). Similarly, Nārada says, "Women are not entitled to make a gift or sale; a woman can only take a life-interest, whilst she is living together with the rest of the family. Such transactions of women are valid, when the husband has given his consent, or, in default of the husband, the son, or, in default of husband and son, the king. She may enjoy

or give away goods according to her pleasure, except immovables; for she has no proprietary rights over fields and the like" (c). Again, a late text of the Mahābhārata says,

স্ত্রীণাম্ স্বপতিহায়াস্তঃ উপভোগফলং শ্রুত ।

নাপাহরণং স্ত্রীয়াঃ কুর্ঘুঃ পত্নিদায়ং কথমঞ্চঃ ॥

—A woman should only enjoy her husband's heritage and must not waste such wealth on any account" (d). But these are only insufficient authorities for postulating the position that Hindu women in those days had only limited or restricted right over the estates inherited by them. With regard to Katyāyana's text it may be said that the theory of limited or restricted estates for Hindu women may be supported only by stretching the language of the text. Katyāyana recognizes widow's right of enjoyment and one fails to see why alienation of property should not be regarded as one of the modes of enjoyment. With regard to the text of Nārada it may be said that it is stated so broadly that it cannot represent the true view of the law, for the verse applies even to stridhāṇa which is recognised from a very early time as her absolute property.

(a) Manu—IX 130, 185, 215, 217; Yaj. II—135, 136; Viṣṇu XVII—4, 5, 7, Bṛh. XXV—46, 47, 55, 56, 63.

(b) Cited in Dayabhaga Ch. XI, Sec. 1, Para 56.

(c) Institutes of Nārada. by Dr. Jolly, Verses 28-30

(d) Evolution of Ancient Indian Law by Dr. Sen Gupta, Page 186.

Lastly, the text in the MahaBharata cannot be treated as a legal norm, for we look to that book only for moral injunctions. It is, therefore, clear that the Smriti's do not recognise any theory of limited estates for Hindu women. Accordingly a women's estate in the Smriti period implied an absolute ownership of a Hindu female acquired by her on intestacy.

Coming down from the Smriti period to the period of commentators we find that the Mitakshara does not impose any restriction upon the widows' power of disposition of her husband's heritage. A plain reading of some texts in the Mitakshara suggests that the whole of husband's estate devolves upon her absolutely by inheritance. Thus, commenting on Yaynavalkya's Text No. 7, the Mitakshara says.—that the term 'Stridhana' as used in that, bears no technical meaning, but it signifies "women's property", or property belonging to a woman, which is its etymological meaning, (e) that the term "or the like" in that text, includes property that a woman may acquire "by inheritance, purchase, partition, seizure or finding", i. e., by the same modes in which a man may acquire property and which are set forth in Ch. 1, Sec. 1' paras 8 and 13; and that Manu and other sages also intended to lay down the same rule, the enumeration by them of sixfold stridhana being illustrative and not intended to be restrictive (f). In this way Vijñāṇeśvara refused to recognise any valid distinction between stridhana and other properties of a woman and confirms beyond doubt the traditional law of absolute ownership of

women over the property inherited by them. This view of the law has also been supported by a host of commentators (g). It is only when we come to the Dayabhaga that we get for the first time definite pronouncement restricting the rights of widow and women generally in the inherited property, Jimutavahana maintains that the widow inheriting her husband's estate is entitled only to enjoy it with moderation, but not to alienate the same by gift, sale or mortgage and etc., and in support of this position he cites above referred text of Katyayana (h). Next, by extending the operation of Katyayana's text to the daughters he maintains that they being inferior to the widow with respect to inheritance, the restrictions imposed by that text should equally apply to them also (i). And lastly, he further extends the operation of the text to the case of women generally by his logic that the text must be understood as applicable to female heirs only, the term widow being merely illustrative. (j). There is no historical justification for this view of the law. And again, this interpretation of Jimutavahana is also not covered by the text of Katyayana. The above view of Jimutavahana, however, held the ground and was definitely confirmed in the period of Anglo-Indian Courts. Betrayed by Jimutavahan's logic the Privy Council accepted the reading of Katyayana's text as given in the Dayabhaga and discarded the whole of Mitakshara doctrine of absolute ownership for women on the ground that it is in conflict with the text of Katyayana who is recognised as a law-giver

(e) Mit. 2, II, 8.

(f) Mit. 2, II, 2 and 4.

(g) Vivada Ratnakar. Text No. 14-16, Veramitodaya, PP. 136-141.

(h) D. B., XI, I, 56.

(i) D. B. XI. I. 65, D.B, XI, II, 30.

(j) D. B. XI, I, 31.

(k) Bhagwandeon O. Myna Bai, II M.I.A. 488, I.W. R. P. C. 23.

even by the Mitakshara, (k). Thus, in *Collector of Masulipatam Vs. Cavalay Vencata* the Privy Council held that the Hindu widow took as heir only a special and qualified estate which she could not of her own will alienate except for religious and charitable purposes (l). In *Bhagwandeem Vs. Myne Bai* the Privy Council held that a Hindu widow took only a limited estate which passed to the husbands heirs on her death (m). And in *Chotaylal Vs. Chunnoo Lal* their lordship of the Privy Council held that a daughter took only a limited and restricted interest in the estate of her father just like a widow and that on her death it reverted to the next heirs of the father (n). Following these cases the Calcutta High Court applied the same rule to the mother's inheritance in *Julesur Vs. Uggur*. (o). The principles laid down in these cases were also followed in numerous subsequent cases. In the very recent case of *Gunam Panamma Vs. Valluri Kamaraju* (1955) the Andhra High Court held that daughters succeeding to the estate of their father or mother took only a limited estate as joint tenants with rights of survivorship and that they were in the same position as widows inheriting the estate of their husband (p). Thus, the Privy Council cases and all other cases which followed them established beyond doubt that woman's estate implied an interest for life of a female Hindu over estate acquired on inheritance and which on her death passed to the heirs of the last full owner.

In the post independence period the Hindu succession Act, 1956, has evolved a new

conception in woman's estate. Sections 14 and 15 of the Act has placed women almost at par with men in respect of property inherited by them. And the clear effect of the operation of these two sections of the Act has been fully stated in numerous judicial decisions.

In *Gulam Missir Vs. Pradip Missir* the Patna High Court has expressed the view that the effect of sections 14 and 15 of the Hindu succession Act, 1956, is that a woman becomes full owner of a property which she acquires on inheritance or otherwise (q). Similarly, in *Smt. Triveni Devi Vs. Smt. Sharada Debi* the Allahabad High Court observed : what section 14 intends to do is that whereas previously, that is, before the Hindu Succession Act came into force, the female took only a limited estate and after the coming into force of section 14 of the Act the limited was enlarged into full ownership (r). Thus the conception of life interest has been done away with. Woman's estate now connotes an estate whether acquired by inheritance or otherwise, over which a Hindu woman has absolute right and which on her death passes to her own statutory heirs. But the Act does not make a Hindu woman absolute owner in respect of all inherited properties. This is clear from the Supreme Court decision in *Gummalapura Vs. Setra Veeravva* where in their Lordships held that the opening words "property possessed by a female Hindu" in section 14 of the Act mean that the property must be in the possession of the female concerned at the date of the commencement of the Act; but unless the

(l) 11 M. I. A., 619, 633.

(m) 11 M. I. A., 488, 9 W. R. P. c. 23.

(n) 61 A. 15, 4C. 744.

(o) 9C. 725.

(p) Andhra W.R. 779.

(q) A.I.R. 1958 Pat. 115.

(r) 1958 A.L. J. 517,

female Hindu whose limited estate in the disputed property is claimed to have been transformed into absolute estate under section 14, is at least in such possession when the Act came into force, section 14 will not apply (s). Therefore, a female Hindu is still regarded as owner of limited estate in respect of estate which was open to succession before the commencement of the Act and which was not

in her possession at the commencement of the Act. She is also treated as limited owner in respect of estates coming under sub-section (2) of section 14 of the Act. In respect of other properties obtained by a Hindu woman under an intestacy she is treated as absolute owner and in these cases a woman's estate implies an absolute estate in fee.

*I stand for Truth. Truth will never ally itself
with falsehood. Even if all the world should be
against me. Truth must prevail in the end.*

This world is not for cowards.

(s) A.I.R. 1950. S.C. 577, Hindu Succession Act, 1956.

Administrative Tribunals and The Principles of Natural Justice

BY

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The growth of modern governmental activities and introduction of new services provided by the State have led to the creation of numerous new special tribunals for the settlement of disputes of determination of rights. The introduction of each new social service has involved both delegated legislation and administrative justice, which may be regarded as introducing a new type of governmental function, provided for the adjudication of disputes by an administrative authority. Social revolution of our time has resulted in the creation of a great number of duties of a kind unknown before. Positive duties of the individuals towards the State, and of the State towards the individual. In the old days, the Legislature nearly always entrusted to the ordinary Courts of Law, the task of ascertaining and vindicating the right and duty which it created—but the enforcement of the great majority of the new duties is now entrusted to Government Departments or to Tribunals, whose members are appointed by the Government Departments. "It should be clearly understood", Lord Denning writes in his *Freedom Under Law*, "that, although the High Court has some degree of control over the tribunals it is not such as to enable it to correct many of the faults or injustices which may arise, unless the statute gives an appeal. The High Court proceeds on the footing that if Parliament has thought fit to entrust jurisdiction

on all these new matters to new tribunals without any appeal from them, then, so long as the tribunals do not exceed or abuse their jurisdiction, the High Court should not interfere with them. If a tribunal should come to a wrong conclusion on the facts, or indeed, if there is no evidence on which it could come to its conclusion, the High Court cannot interfere: nor, if the tribunal comes to a wrong conclusion in point of law, can the High Court interfere. So long as the tribunal keeps within its jurisdiction, and is not guilty of any 'flagrant, unjust procedure, its decision is final both on facts and law.' Prof. Robson, in his *Justice and Administrative Law* writes, "Where the administrative tribunal has kept within their jurisdiction, it is now settled law that absence of evidence does not affect the power of the tribunal to try the case, nor can the Court interfere on the ground that the tribunal have misdirected themselves in considering the evidence or come to a wrong conclusion in law. In none of these events can the Court quash the determination of the tribunal by an order of *certiorari* or any other means. If Parliament has chosen to make the administrative tribunal the final judges of the matters before them and to give no appeal, the Court cannot interfere. "Prof Robson further writes, "We can see, then, that the supervisory jurisdiction of the High Court is a superficial protection which does provide an effective method of judicial

review.....The concept of legal bias as a disqualifying element for the performance of judicial powers in becoming unmanageable in the modern State, in which government agencies and administrative tribunals are often expected to exercise their functions so as to fulfill specified public policies."

Sir Carleton Kemp Allen writes in his *Law and Orders*, "Common experience, history, and comparative jurisprudence all teach that justice contains little which can be called 'natural', if by that term we mean something which is inborn in human nature, or, in the old theological phrase, 'written on men's hearts'. There is no justice universal and self-evident in all places and circumstances and at all times; nor does the 'sense of justice' come merely by the light of nature, but by reflective understanding of human affairs in different settings and in all their endless complexities." The most frequent cause for judicial interference with the exercise of quasi-judicial powers is a disregard of what are known as the rules of natural justice. The first is usually expressed in the maxim that 'a man cannot be judge in his own cause'. Its real significance in practice is that an issue becomes a man's 'own cause' if he has such interest in its determination that, according to the ordinary limitations of human nature of which the law takes a sternly realistic view, he is incapable of deciding impartially. In that case, he is not a judge and what he decides is not a judgement. The natural justice demands that the first requirement in a judge is that he shall decide impartially between the disputants, irrespective so far as this humanly possible of the personal performances and prepossessions of which every human being is subject. The second principle is *audi alteram partem* which means that both sides must be heard before it can be decided. These are the

two cardinal principles of natural justice and without these principles there is no 'judgment' at all. Any judgment passed by any tribunal will be quashed and set aside if it is violative of rules of natural justice. But these rules do not require that the proceedings of an administrative tribunal must be conducted as in a court of law or in accordance with the strict rules of evidence, but they seek to ensure that justice shall not only be done, but also seem to be done. Bias must be eliminated from influencing judicial decision. Without the consent of all parties no judge can adjudicate an issue in which he has any personal or proprietary interest at stake.

The leading English case on this topic is *Local Government Board-v-Aldridge* (1915) A. C. 120 where the House of Lords held that Aldridge could not object on the grounds that he did not have an opportunity of being heard orally by the official who decided his case and that he was not permitted to see the report of the inspector who conducted the public enquiry on behalf of the board, since Parliament having entrusted judicial duties to an executive body must be taken, in absence of any declaration to the contrary, to have intended it to follow the procedure which was its own and was necessary if it was capable of doing its work efficiently. Furthermore, Parliament had empowered the Board to frame rules to regulate its own procedure. So long as the officials dealt with the question referred to them without bias, and gave the parties an opportunity of presenting the case in adequate form, the Board could follow its own particular methods of procedure which were necessary, if it were to do its work efficiently even though the procedure did not follow meticulously that of a court of law.

Similarly in *Board of Education-v-Rice*

(1911) A. C. 179, the House of Lords held that in disposing of an appeal the Board of Education was bound to act in good faith and to listen fairly to both sides, since that was a duty which lay on everyone who decided anything. The Board was not, however, bound to follow the procedure of a trial. It could obtain information in any it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view.

The rules of natural justice have been described by House of Lords in *Spackman-v-Commissioner of Public Works* (1885) 10 App. Cas. 229 as follows :

"No doubt in the absence of special provisions as to how the person who is to decide is to proceed the law will imply no more than the substantial requirements of justice shall not be violated. He (the administrator) is not a judge in the proper sense of the word ; but he must give the parties an opportunity of being heard and stating their case and their view. He must act honestly and impartially and not under the direction of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice."

Many decisions of administrative and domestic tribunals have been set aside and quashed by the Supreme Court on the ground that the principles of natural justice have not been observed ; and the Supreme Court has discussed and laid down the extent of which are to be observed by these tribunals. In England, a statutory invasion of the common law objection on ground of bias is tolerated

by decisions-but the invasion is confined strictly to the limits of a statutory exception. Therefore, unless the legislature clearly and expressly ordained to the contrary, the principles of natural justice cannot be violated. The Supreme Court in *Gullappalli Nagaswarrao & Oths.-v-State of Andhra Pradesh* : A. I. R. (1959) S. C. 1376 held that in England, the Parliament is supreme and therefore a statutory law, however, repugnant to the principles of natural justice is valid ; whereas in India, the law made by Parliament or a State Legislature should stand the test of fundamental rights declared in Part III of the Constitution.

Explaining the meaning of natural justice, the Supreme Court held that, stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. (*Union of India-v-T. R. Varma* : A. I. R. 1957 S. C. 882 ; *Phulbari Tea Estate-v-Its Workmen* : A. I. R. 1959 S. C. 1111 ; *State of Madhya Pradesh-v-Chintaman Sadashiva Waishampayā* A. I. R. 1961 S. C. 1623). In T. R. Varma's case the Supreme Court held that the Evidence Act has no application to enquires conducted by tribunals even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a court of law. If

these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in Evidence Act for taking evidence was not strictly followed.

A public servant is entitled under Article 311(2) of the Constitution, to have a reasonable opportunity to meet the charges framed against him. A proper opportunity must be afforded to him at the stage of the enquiry after the charge is supplied to him as well as at the second stage when punishment is about to be imposed on him. In this connection the departmental enquires should observe rules of natural justice, and if they are fairly and properly conducted the decision reached by the enquiry officers on the merits are not open to be challenged on the ground that the procedure followed was not exactly in accordance with that which is observed in Court of Law. (*State of Madhya Pradesh-v-C. S. Waishampayan* : A. I. R. 1961 S. C. 1623) In the same case the Supreme Court held that the right to cross-examine the witnesses who give evidence against him is very valuable right and if it appears that effective exercise of his right has been prevented by the enquiry officer by not giving to the officer relevant documents to to which he is entitled, that inevitably would mean that the enquiry had not been held in accordance with rules of natural justice. In *Bachhattar Singh-v-State of Punjab* : A. I. R. 1963 S. C. 395, the Supreme Court held : Departmental enquiry held against a Government servant cannot be divided into (a) the enquiry (which involves a decision of the question whether the allegations made against the servant are true or not) and (b) taking action (i. e. in case the allegations are found to be true, whether the servant should be punished or not and if so in what manner) and after so dividing the first point cannot be

treated as involving a decision on the evidence and described as judicial while the latter is purely an administrative decision liable to be changed by the State. Departmental proceedings taken against a Government servant are not divisible in this sense. There is just one continuous proceeding though there are two stages in it. The first coming to a conclusion on the evidence as to whether the charges alleged against the Government servant are established or not and the second is reached only if it is found that they are so established. That stage deals with the action to be taken against the Government servant concerned. But these stages are equally judicial. Therefore, this stage of the proceedings is no less judicial than the earlier one. Consequently any action decided to be taken against a Government servant found guilty of misconduct is a judicial order and as such it cannot be varied at the will of the authority who is empowered to impose the punishment. Indeed, the very object with which notice is required to be given on the question of punishment is to ensure that it will be such as would be justified upon the charges established and upon the other attendant circumstances of the case. It is thus wholly erroneous to characterise the taking of action against a person found guilty of any charge at a departmental enquiry as an administrative order.

But the Enquiry officer is not bound by the strict rules of the law of evidence and when the public servant declined to take part in the proceedings and failed to remain present, it was open to the Enquiry Officer to proceed on the materials which were placed before him. It is not within the competence of the Civil Court to sit in judgment over the decision of the authority who is competent by law to dismiss a public servant provided he has been afforded

an opportunity to defend himself consistently with the substance of the Constitutional guarantee. The content of the reasonable opportunity under Article 311 (2) of the Constitution is the same as in Section 240 (3) of the Government of India Act, 1935. An opportunity to show cause is reasonable even if it does not contemplate a further opportunity to examine before authority competent to impose punishment provided there has been a fair and full enquiry at an earlier stage before the Enquiry Officer. (*Major U. R. Bhatt-v-Union of India*: A. I. R. 1962 S. C. 1344).

The Civil Services Rules merely prescribe the diverse punishments which may be imposed upon delinquent public servants: the rules do not provide for specific punishments for different misdemeanours. The Rules leave it to the discretion of the punishing authority to select the appropriate punishment having regard to the gravity of the misdemeanours. The power of the President to impose any punishment for any misdemeanour found proved against a delinquent public servant is unrestricted. The Constitution merely guarantees the protection of reasonable opportunity of showing cause against the action proposed: it does not guarantee that the punishment shall not be more severe than a prescribed punishment. Where after the report of the Enquiry Officer was received the employee concerned was called upon to show cause against his proposed dismissal from service and was afforded an opportunity to make his defence, the President does not violate guarantee of reasonable opportunity imposing the punishment of removal from service instead of dismissal. The question of imposing punishment can only arise after enquiry is made and the report of the Enquiry Officer is received. It is for the punishing authority to propose the punishment and not for the enquiring authority. The latter

has, when so required to appraise the evidence, to record its conclusion and if it thinks proper to suggest the appropriate punishment. But neither the conclusion on the evidence nor the punishment which the enquiry authority may regard as appropriate is binding upon the punishing authority. (*A. N. D'Silva-v-Union of India*: A. I. R. 1962 S. C. 1130).

In enquires regarding dismissal of employees the principles of natural justice must be followed and the employee against whom disciplinary action is sought to be taken must be given a chargesheet, evidence against him must be recorded in his presence, and he must have an opportunity to rebut the said evidence.

The meaning of "the evidence of the opponent should be taken in his presence" has been explained by the Supreme Court in *State of Mysore-v-Shivabasappa Shivappa Makupur*: A. I. R. 1963 S. C. 375. In that case on complaint being preferred Mr. Majumdar, Inspector, C. I. D. made a preliminary investigation, examined a number of witnesses and recorded their statements, and submitted his report recommending further action. On the basis of the said report charge-sheet was framed against the respondent. The respondent denied the charges, and then a regular enquiry was held. The Deputy Superintendent recalled the witnesses who had been examined by Mr. Majumdar during the preliminary investigation brought on record the previous statements given by them, and after putting a few questions to them, tendered them for cross-examination by the respondent. As a matter of fact, all the witnesses were cross-examined by the respondent in great details. The sole point for determination before the Supreme Court was whether the procedure adopted by the Deputy Superintendent of Police in admitting the statements of witnesses examined before

Mr. Majumdar in evidence is opposed to the rules of natural justice. The Supreme Court held, "The question is one of importance, because as appears from the cases which have come before us the procedure followed by the Deputy Superintendent of Police in this case is the one followed by many tribunals exercising quasi-judicial powers. For a correct appreciation of the position, it is necessary to repeat what has been said that tribunals exercising quasi-judicial functions are not Courts and they therefore they are not bound to follow the procedure prescribed for trial of actions in Courts nor are they bound by strict rules of evidence. They can unlike Courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedure which govern proceedings in Court. The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is a fair opportunity must depend on the facts and circumstances of each case but where such an opportunity had been given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in Courts..... When the evidence is oral, normally the examination of the witness will in its entirety, take place before the party charged, who will have full opportunity of cross-examining him. The position is the same when a witness is called, the statement given previously by him behind the back of the party is put to him, and admitted in evidence, a copy thereof is given to the party, and he is given an opportunity to cross-examine him. To require in that case that the contents of the previous statement should be repeated by the witness word by

word, & sentence by sentence, is to insist on bare technicalities, & rules of natural justice are matters not of form but of substance. In our opinion they are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged, and he is given an opportunity to cross-examine them."

But where in an enquiry by a Company against its employee it appeared that the witnesses who were present at the enquiry were not examined in the presence of the employee, copies of the statements made by the witnesses were not supplied to him before he was asked to question them and the statements which had been recorded were not read over to the employee at the enquiry before he was asked to question the witnesses. The statements which were recorded were produced on behalf of the company before the Tribunal, but the witnesses were not produced so that they might be cross-examined even at that stage on behalf of the employee. The Tribunal came to the conclusion that the dismissal of the employee was not justified on the ground of proper procedure not having been followed. Upholding the decision of the Tribunal the Supreme Court held that in the circumstances the finding of the Tribunal that the enquiry in this case was not proper was correct and must stand. (*Phulbari Tea Estate-v-Its Workmen*: A. I. R. 1959 S. C. 1111). The proceedings under Articles 226 & 227 of the Constitution, the High Court cannot sit in appeal over the findings recorded by the competent tribunals in a departmental enquiry so that if the High Court has purported to reappreciate the evidence for itself that would be outside its jurisdiction. However, if it is shown that the impugned findings recorded by the Administrative Tribunals are not supported by any

evidence the High Court would be justified in setting aside the said findings. In conducting the enquiry the Tribunals shall be guided by rules of equity and natural justice and shall not be bound by formal rules relating to procedure and evidence. (*The State of Orissa-v-Murlidhar Jena* : A. I. R. 1963 S. C. 404). In *Provincial Transport Services-v-State Industrial Court, Nagpur* : A. I. R. 1963 S. C. 114, the Supreme Court held that the decision of the Labour Commissioner that no enquiry had been held by the management amounts, therefore, to a clear error in law. The Industrial Court errs in thinking that it was bound by the decision of the Labour Commissioner and this error on its part was an error so apparent on the face of the record that it was proper and reasonable for the High Court in proceedings under Articles 226 & 227 to correct that error.

The contention that a finding made by a competent authority is based on the legal evidence is easy to make but very difficult to establish. Such a contention can succeed only when it is shown that there is really no legal evidence in support of the view taken by the appropriate authorities, on considering the circumstances, concurrently found against the petitioner, that obviously is not a matter which can be legitimately agitated in writ petition under Article 32. In *Bhatnagore & Co. Ltd.-v-Union of India* : A. I. R. 1957 S. C. 478; the Supreme Court held that, the petitioner's poor financial resources, his conduct at all material times when consignments were ordered, the suspicions attaching to the very existence of the firm M/S. N. Jivanlal & Co, in Bombay and the prominent part played by this firm at all stages of the transactions in regard to the consignments as well as the reckless allegations which were found to be untrue by the appropriate authorities, cannot be summarily

dismissed as being irrelevant or as not constituting legal evidence.

The rules of natural justice vary with the varying statutory bodies, and the rules prescribed by the Acts under which they function. The question, whether or not any rules of natural justice, had been contravened, would be decided not under any preconceived notions, but in the light of statutory rules and provisions. Where no such rules which could be said to have been contravened by a tribunal is brought to the notice of the Court, it is no ground for interference either under Article 226 or 227, simply because the tribunal had viewed the matter in the light which is not acceptable to the Court. (*Nagendra Nath Bora-v-Commissioner of Hills Divisions* : A. I. R. 1958 S. C. 398). In *Express Newspaper Ltd.-v-Union of India* : A. I. R. 1958 S. C. 578, the question was raised of the vires of Working Journalists (Conditions of Service) and Miscellaneous Provisions Act and the decision of the Wages Board constituted thereunder. The Supreme Court held that whatever be the character of the functions performed by the Wages Board whether they be legislative or quasi-judicial, if proper safeguards are adopted e. g., provision of judicial review or the adopting of the procedure as in the case of the recommendations of the Wages Councils in the United Kingdom, or the advisory committees which come to be considered by the Administrator under the Fair Labour Standards Act in the U. S. A., no objection could ever be urged against the determinations of the Wages Board thus arrived at on the scores of the principles of natural justice having been violated. In *Mahadayaal Premchandra-v-Commercial Tax Officer, Calcutta* : A. I. R. 1958 S. C. 667, the appellant taxed by assessing authority on instructions from superior authority, assessing authority not exercising his own judgment. The

appellants had no opportunity of meeting the point of view which had been adopted by the Assistant Commissioner and the Commercial Tax Officer quietly followed these instructions and advised of the Assistant Commissioner. On these facts the Supreme Court held that it was clear that he did not exercise his own judgment in the matter and faithfully followed the instructions conveyed to him by the Assistant Commissioner without giving the appellant an opportunity to meet the points urged against him. The whole procedure was contrary to the principles of natural justice. The procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the Sales tax department.

Where in a departmental "trial" against a police constable, before a Deputy Superintendent of Police, to contradict the testimony of a prosecution witness, the Deputy Superintendent of Police who conducted the enquiry, himself gave a testimony, there is a grievous violation of natural justice. The act of Presiding Officer in having his testimony recorded in the case indubitable evidence a state of mind which clearly discloses considerable bias against the constable. It is shocking to the notions of judicial propriety and fairplay. (*State of U. P. V-Mohammad Nooh*; A. I. R. 1958 S. C. 86). Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. (*Gullapalli Nageswar Rao-V-Andhra Pradesh State*; A. I. R. 1959 S. C. 308).

A workman against whom an enquiry is

being held by the management has no right to be represented at such enquiry by a representative of his Union though of course an employer in his discretion can and may allow his employee to avail himself of such assistance. The natural justice does not demand that in the case of enquiries into a charge-sheet of misconduct against a workman he should be represented by a member of his Union. (*N. Nalindi & Oths. -V-M/S. Tata Locomotive and Engineering Co. Ltd.*; A. I. R. 1960 S. C. 914). Though very often employers stay enquiries into the misconduct of the employees pending the decision of the criminal trial courts dealing with the same facts and that is fair, it cannot be said that principles of natural Justice require that an employer must wait for the decision, at least of the criminal trial court, before taking action against an employee. However, if the case is of a grave nature or involves questions of fact or law, which are not simple, it would be advisable for the employer to await the decision of the trial court, so that the defence of the employee in the criminal case may not be prejudiced. (*Delhi Cloth and General Mills Ltd.-v-Kushal Bhan*; A. I. R. 1960 S. C. 806). In *F. N. Roy-v-Collector of Customs, Calcutta*, A. I. R. 1957 S. C. 648, the Supreme Court held that there is no rule of natural justice that at every stage a person is entitled to a personal hearing. Moreover when the appeal against the orders of the Custom-Authorities was filed beyond limitation, and the Appellate authorities dismissed the appeal as barred by limitation without hearing the appellant, there is no violation of the rules of natural justice.

In *The New Prakash Transport Co. Ltd.-v-The New Suwarna Transport Co. Ltd.*; A. I. R. 1957 S. C. 232, S and P applied for permits for certain route under the Motor Vehicle Act;

P's application was rejected on grounds of adverse police report. P appealed against the decision. The authorities obtained further police report, the Appellate Authority read out the second police report to the parties. No objection was taken by the parties and no request for adjournment was asked for on the ground either that it had been taken by surprise or that it had materials to offer in opposition to the report. On these facts the Supreme Court held that there was no failure of natural justice. In *M/S. Fedco (p) Ltd. and anth.-v-S. N. Bilgrami*: A. I. R. 1960 S. C. 415, the petitioner's licence was cancelled on the ground that it had been obtained by fraud. At the interview the representative of the petitioners pointed out that in the absence of any particulars of the alleged fraud and without inspection of the papers relied upon by the authority it was not possible for the petitioners to give a complete explanation and that they reserved their rights to give further explanation on getting the said particulars and inspection of the said papers. However, no particulars were furnished and no inspection was allowed by the authority. On these facts the Supreme Court held by majority that the opportunity given to the licensee in this case amounted to reasonable opportunity notwithstanding the omission to give particulars of the fraud or inspection of papers. In the said case the Supreme Court held that the requirements that a reasonable opportunity of being heard must be given has two elements. The first is that an opportunity to be heard must be given, the second is that this opportunity must be reasonable. Both these matters are justiciable. There can be no invariable standard for reasonableness in such matters, except that the Court's conscience must be satisfied that the person against whom an action is proposed has had a fair chance of convincing the authority who proposes to take

action against him that the grounds on which the action is proposed are either non-existent, or, even they exist, they do not justify the proposed action. The decision of the question will necessarily depend upon the peculiar facts and circumstances of each case, including the nature of the action proposed, the material on which the allegations are based, the attitude of the party against whom the action is proposed showing cause against such proposed action, the nature of the plea raised by him in reply, the request for further opportunity that may be made, his admission by conduct or otherwise of some or all the allegation and all other matters which help the mind in coming to a fair conclusion on the question.

In *Ram Chandra Prasad-v-State of Bihar*: A. I. R. 1961 S. C. 1629, the Supreme Court held that, the word 'Law' in Article 21 of the Constitution refers to Law made by the State and not to positive law or law in the abstract sense embodying the principles of natural justice, and "procedure established by law" means procedure established by law made by the State, that is to say, by the Union Parliament or the Legislatures of the States.

To what extent bias disqualifies a person from acting as a judge has been fully dealt with by the Supreme Court in *Manak Lal (Advocate)-v-Dr. Prem Chand Singhri & Ors.* A. I. R. 1957 S. C. 425. In dealing with cases of bias attributed to members constituting tribunals, it is necessary to make a distinction between pecuniary interest and prejudice so attributed. It is obvious that pecuniary interest however small it may be in a subject-matter of the proceedings would wholly disqualify a member from acting as a judge. But where pecuniary interest is not attributed but instead bias is suggested, it often becomes necessary to consider whether there is a reasonable ground

for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would always be a question of fact to be decided in each case. The principle *nemo debet esse judex in causa propria sua*, precludes a judge who is interested in the subject-matter of a dispute, from acting as a judge therein. The principle applies not only to judges but to all tribunals and bodies which are giving jurisdiction to determine judicially the rights of parties. The alleged bias in a member of the tribunals does not render the proceedings invalid if it is shown that the objection against the presence of the member in question had not been taken by the party even though the party knew about the alleged bias and was aware of his right to challenge the presence of the member in the tribunal. It is true that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection.

Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. There are other exceptions of rules of natural justice where a man can be judged of his own cause, they are, (a) in case of necessity i. e. where there is no other person to adjudicate or try the dispute, and (b) where the statute expressly empowers an officer to act both as a judge and prosecutor. There is no decision of our Supreme Court on these points and it is to be seen how far constitution permits such exceptions to the rules of natural justice. The proposed amendment of Article 311 of the Constitution will take away much of the spirit of rules of natural justice and will give more power to the executive. Some change in the administration of law was indubitably needed, if the new world of social control was to be brought peacefully into existence. Social interests cannot be secured or a social policy effected, by the application of abstract principles of justice as between man and man.

*My child, what I want is muscles of iron and
nerves of steel inside which dwells a mind of the
same material as that of which the thunderbolt is
made.*

Freedom of Judiciary in India

BY

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The Separation of different organs with respective functions, legislative, executive and judicial, is a modern development in politics. The theory of separation of powers was first enunciated by the French publicist Montesquieu about the middle of the eighteenth century. It means that the different functions of Government—executive, legislative and judicial—should be performed by different persons organised into distinct institutions, each independent of the other. The separation of powers has been defined by Mr. Willoughby as “the greatest guarantee of the political liberties and safeguard against a despotic use of powers by the public officials.” The framers of the American Constitution sharply separated the organs, by vesting the executive power in a President, the legislative power in the congress and the judicial power in the Supreme Court, each authority being independent within its own sphere. In England, where a satisfactory democratic government is running on, there is no separation of powers as the Cabinet System joins the executive and legislative powers; and the judiciary cannot override any statute passed by the legislature. In India, there is not only co-operation but also interdependence between executive and legislature, as in England. In our constitution, the President or the Governor—head of the executive—is practically bound to accept the advice of his council of Ministers, who again

are the main members of the ruling political party having majority in the legislature.

But our judiciary is completely independent and it possesses the power to invalidate the legislative acts which are not constitutionally valid and the illegal interference by the executive, when necessary. The Supreme Court—the highest court of appeal in India—can easily be compared with the Supreme Court of the United States of America. India is a sovereign democratic republic, and the citizens enjoy certain important fundamental rights. The framers of the Indian Constitution were fully alive to the supreme importance of the Judicial remedies to enforce fundamental rights and that is why they not only expressly laid down that any law which contravenes any of the fundamental rights shall be void, but also incorporated in the constitution itself certain extraordinary remedies for enforcing these rights against any state action, legislative or executive. Further, the right to make use of these constitutional remedies itself was also guaranteed by the Constitution so that nothing short of an amendment of the constitution can take away the power of the superior courts, that is, the Supreme Court and the High Courts (in which the power is vested by Articles 32 and 226) to apply these constitutional remedies for the protection of the individual rights guaranteed by our constitution. The courts have made it clear that they

can not refuse to entertain an application for an appropriate constitutional remedy where a fundamental right has been infringed.

At the inauguration of our Supreme Court in 1950, it was pointed out that it had the widest and the most varied jurisdiction among the highest courts in the commonwealth and Anglo-Saxon countries. Apart from the width and variety of its functions, it was required to exercise under Article 32 of the constitution a jurisdiction which is altogether new to our country. It was called upon to stand as protector of the fundamental rights of the citizens against the executive and legislative action. The importance of the court as the upholder of the rule of law and as the bulwark of the citizen's right in a democratic constitution containing a bill of rights was emphasised by the Hon'ble Chief Justice of India (Kania C. J.) at its inaugural sitting in the following words :—

“Under the Constitution of India, the Supreme Court is established to safeguard the fundamental rights and liberties of the people. An independent Supreme Court in other democratic countries will have far-reaching influence on the constitutional history and progress of the Union of India.”

The Hon'ble Mr. Justice Patanjali Sastry while rejecting the contention that a citizen should approach a High Court under Article 226 in respect of the infringement of his fundamental rights, before approaching the Supreme Court under Article 32, observed as follows :—

“The court is thus constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibilities so laid down upon it, refuse to entertain applications for protection against the infringement of such rights.” The same Hon'ble Judge as Chief Justice in a later case dealing with

constitutionality of a statute said, “If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit but in discharge of a duty plainly laid upon them by the constitution. This is especially true as regards the ‘fundamental rights’ as to which this court has been assigned the role of a sentinel on the *qui vive*.”

It is necessary for all to realise that the role assigned to the judiciary under Constitution is an essential one and that the high ideals, the attainment of which is aimed at by our Constitution, social and economic justice, equality, freedom and dignity of individual will be impossible of achievement unless the judiciary fearlessly discharge its duties in every complaint of excess of power by the legislatures or the executive, brought to its notice. A proper realisation of these aspects at the highest level can alone bring about a change in the attitude towards judiciary. A respected and strong judiciary and a respected and strong bar are essential to maintain our system of freedom under law. The importance of the judicial office, its high place in the development of the nation and the nature of the work of the superior judiciary have not been sufficiently appreciated in our country. In this connection an observation made by an eminent person after dealing with the existing method of appointment of High Court Judges may be quoted, “There is an insidious and calculated attempt on the part of the executive to bring down the prestige of the High Court Judges. In the old days, in all public functions the High Court Judges used to be assigned prominent places ; but now they are hardly taken any notice of and if any notice is taken at all, they are relegated to the background. In the warrant of precedence they are gradually being

demoted. In the matter of amenities they are far behind the ministers. This visible deterioration of the external trappings of the office of High Court Judges has naturally to a certain extent affected public respect for them. All these matters have contributed to the public feeling that High Court Judiciary is not what it used to be." But our Constitution, realizing the importance of safeguarding the independence of the judiciary has provided that a Judge of the Supreme Court or of the High Court shall not be removed from his office except by an order of the President passed after an address by each house of Parliament supported by a majority of not less than two-thirds of the members present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. A Judge of the Supreme Court shall be appointed by the President in consultation with the Chief Justice of India and after consultation with such of the other Judges of the Supreme Court and the High Courts as he may deem necessary. Similarly, every Judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State and in the case of the puisne judges, the Chief Justice of the High Court.

Sir Winston Churchill, the Prime Minister of Britain based his proposal, when introducing in the House of Commons, a Bill for raising the remuneration of the Judges, on the need of guarding the independence of the Judiciary from the executive in the following words :—

"The principle of complete independence of the judiciary from the executive is the foundation of many things our island life. It has been widely imitated in varying degrees throughout the free world. The Judge has not only to do justice between man and man. He also—and

this is one of the most important functions considered incomprehensible in some large parts of the world—has to do justice between the citizens and the state. He has to ensure that the administration conforms with the law, and to adjudicate upon the legality of the exercise by the executive of its powers."

In India, though there is independence of the judiciary, there is no express provision for separation of powers, as in America. In Part IV dealing with directive principles of state policy, it has been stated in Article 50 that "The state shall take steps to separate the judiciary from the executive in the public services of the state. "In some states, like Orissa, Bombay etc. the scheme for separation of judiciary has been introduced. In spite of that, the express provision for management of the subordinate judiciary also have kept the lower courts free from direct or indirect interference. Appointments and the posting of district Judges shall be made by the Governor in consultation with the High Court. The control over district courts and courts subordinate there to including the posting and promotion of, and the grant of leave to persons belonging to the state Judicial Service shall be vested in the High Court, but nothing in the article (235) shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under law.

"In order that the Supreme Court may have the full assistance, the High Courts will have to be strong in their Personnel,"—this important saying of Chief Justice Kania reminds one of the other similar saying that "a strong and respected judiciary and a strong and

respected Bar are essential to maintain our system of freedom under law." Judiciary should consist, of strong and eminent personnel to function smoothly and efficiently.

From the discussions made above, one may conclude that, in our country, the judiciary is independent of any executive or legislative interference, the Judges are free to comment anything in their judicial capacity and the legislature has no power to interfere with the Supreme Court of High Court—judicial or administrative. The Chief Justice of India is practically the head of the judiciary and in different states, the Chief Justice of the High Court is the real head of the State judiciary.

Lastly, it will be perhaps better to refer to a concrete case in which it has been proved that in judicial matter, the executive or legislative authorities have nothing to do but to surrender to the judgment of the Court. The most recent case is the Ahuja murder case—better known as Nanavati case, in which Nanavati who had risen to the rank of Commander and was second in command of the Indian Navy's flagship, INS Mysore, has been held guilty of

murdering Ahuja and is now going life imprisonment, as confirmed by the Supreme Court of India. Nanavati was an efficient Commander of the Indian Navy. He is now within the four walls of the prison.

India has lost an able naval officer like Commander Nanavati. But law is no respecter of persons. Nanavati may be a good officer and an asset, but in the eye of law, he is no better than a murderer before the judge for trial. The grim tragedy of a great personality has moved everyone, but as we cannot take law into our own hand, Nanavati was found guilty of murder—intentional and premeditated. The Governor of Maharashtra, under the powers granted to him under Article 161 of the Constitution, had suspended the sentence of Nanavati. But ultimately Nanavati had to surrender to the judgement passed by the High Court of Maharashtra, as directed by the Supreme Court, and now he has been sentenced to imprisonment for life. We may lose a naval Commander like him, but we are proud of the country's judiciary for its scrupulous interpretation and implementation of the laws of the land.



*Truth is infinitely more weighty than untruth,
so is goodness. If you possess these, they will make
their way by sheer gravity.*

Asura form of Marriage in Assam

BY

P. THANKAPPAN NAIR.

Roll No.—10 Sec. A 1st Year.

Most of the Hindu law-givers such as Manu, Vasishta, Gautama and Vishnua have mentioned marriage by purchase as an institution when those Samhitas were either written or codified, though under the later Brahmanical influence, a reaction had set in to condemn it outright, stigmatizing it as anti-social. It is interesting to note that Vasishta has adduced testimony from the Vedas, found in Sankhyana Grihya and in Maitrayarian Samhita, to show the sanction of Vedas to the purchase of women for the express purpose of marriage. There is considerable divergence of opinion among the law-sages as to whether such purchased-girls are eligible to be counted as *patnis*. According to Manu, there is no social ostracism among the Sudras and Vaisyas if they marry according to the Asura form.

It is quite understandable why the compiler of the Manu Samhita or the mythical personage himself or his followers have not condemned Asura form for Sudras and Vaisyas. Aryans have labelled the autochthons of India as Asuras, Nishadas, Kiratas, Mlechhas etc. and it is natural that Vaisyas and Sudras were outside the pale of Aryan influence. The ultimate evolution of 8 forms of marriage found in the law-books seems to be a compromise between the Aryan and non-Aryan usages.

A survey of the practice of marriage by purchase among the aboriginal people of India

at present will throw some light on the widespread prevalence of such a time-honoured institution even after thousands of years of Aryan hegemony, successive onrush of marauding hordes and subjugation of the people by European imperialists till recently. Such an institution, though despised by the foreign invaders and abhorred by the Aryans, must have some intrinsic value for its perpetuation; otherwise it would not have outlived such a catastrophe.

A word of caution.

A word of caution may be sounded here. The term 'purchase' has been indiscriminately popularized by European Missionaries, not only to belittle such a humble and utilitarian institution, during the course of their proselytization, but also as a weapon to disarm and discredit the people who practised it. The modern meaning attached to the term 'purchase' is quite unknown to the primitive people. There was no question of cash transaction till a very recent date. Due to cultural contact with the economically and socially advanced people, the aborigines have substituted their standard monetary units like 'mithun' (wild ox) or 'cowry shells' by that of Rupee. The payment in kind has been substituted by cash when the tribe in question entered into money-economy stage. Sometimes both kinds of payment are met within one and the same tribe, which means that

the particular tribe is in transition. The primitive people have no notion of commercial exchange in respect of bride-purchase. Marriage by purchase has been preceded by marriage by service, since evolution of personal property is of later origin. The commutation of service is equivalent to the payment for bride either in cash or kind.

Economics of marriage by Purchase.

Marriage is a partnership in which the economic association of the spouses is cemented by the approbation of the community, besides enhancement of the competitive strength of the parties concerned. The pooling of the resources of the two would certainly be greater. When a person is entering into a marriage partnership, the goodwill earned transcends the material plane, notwithstanding his or her transference of potential economic asset to the common pool. More partners, either male or female, imply more hands to work; consequently larger the production and swifter the economic emancipation of the parties.

Bride-price analysed.

Many of the primitive people of India consider bride-price as an insurance against bird's flirtations, unlawful associations with persons outside the family or clan, ravishment by others and post-marital *affaires d'amour*. Some of the tribes, consequently do not make outright payment of the stipulated bride-price at the time of marriage or betrothal; but it is paid in instalments. Instalments will cease in case of bride's misbehaviour or mesalliance. Theoretically speaking, bride-price may be considered as a payment made to the clan or family which transfers the economic asset, the bride, to the bridegroom or his family or clan, and as such even after the death of the particular individual to whom the girl has been

married to, she is claimed, as a matter of right, by the eligible members of the deceased husband's family or clan. Return of the original bride-price, or more, and in some cases less, is insisted upon, if the widow wants to marry outside the family.

Those who transfer the economic asset need sufficiently be compensated by payment either in kind or cash. Such compensation is perfectly logical and legitimate. The determination of bride-price in terms of demand and supply does not fall under the scope of this essay.

Bride-price, it is to be noted, is paid not to be bride. It is the parents or consanguine or uterine relatives who receive it. This is to emphasize the sanction of the clan to such transference of economic asset.

The primitive view-point of bride-price to which we subscribe in this article is not to be scorned at. A woman among the primitive peoples, sudders at the very idea of her being acquired by another for nothing. She naturally feels elated at the very high price she fetched. Higher prices are paid for beautiful, hard-working, persistent and thrifty brides. Greater the bride-price paid or received, superior is the social standing of the parties concerned in a matrimonial alliance.

Abuses of Bride-price.

A different view of bride-price should not be altogether overlooked. The institution of bride-price had led to certain extent monopolisation of nubile girls by wealthy old men among some of the aboriginal people of India. Consequently the younger generations find it difficult to procure wives. Sometimes they are to be content with brides of inferior calibre. Another abuse of bride-price is that it has led to the enslavement of the womenfolk. Women are treated like chattels and cattles by

those who purchase them. In such cases bride-price is to be condemned.

In concluding this part of the essay, I am of the opinion that bride-price as an institution is of later origin when the society transcended from the matriarchal form to that of patriarchal form, for bride-price and matriarchy seems to be incompatible. I have, therefore, taken my examples from the patriarchal populations of Assam only. The best example of a matriarchal society in Assam is that of the Khásis. Among them bride-price is not the rule.

Bride-price in its unadulterated form is found in Assam, which country has held aloof from the Aryans way for centuries altogether. Consequently, among the indigenous patriarchal populations of Assam, bride-price as an established institution still flourishes. A survey of this practice among the Nagas will be followed by citing examples from other tribes.

The Nagas

Thus, among the Lhota Nagas (1) bride-price, collectively known as *oman* and composed of a number of items, is partly paid in cash and partly in kind. Girls among them are married young and bride-prices are often high, varying from Rs. 20 to Rs. 150 which may be paid in instalments, extending over 10 years or so, and constitutes some guarantee of the wife's good behaviour, and if she gives trouble the instalments are apt to cease. Those who can't afford to pay any price will serve for the prospective father-in-law like Jacob in Laban's house for Rachel for about a year or so. The Marriage-price among the Ao Nagas (2) is "not big as a rule, varying from five to sixty baskets of rice, with, in some villages, a leather shield and one or more

doas". A Rangma Naga (3) bride-groom will pay the bride-price in slow instalments. "Formerly the whole marriage-price was paid in cattle spear-heads. At a marriage among them two spearheads go to the girl's father's, and one to the girl's mother's eldest brother". To receive a marriage-price among the Rangmas, says Mills "is in no way an immoral sale of the girl. The price is compensation for her leaving the clan, and is of immense moral value". First instalment of bride-price is a cow and cash varying from Rs. 10 onwards. The Eastern group of Rangmas pay a marriage price to the equivalent of Rs. 30 to Rs. 40. The Sema (4) marriage is still practically a matter of purchase". "The prices paid for wives vary very considerably indeed according to their station in life, ranging in value from Rs. 20 or even less to as much as Rs. 400 or Rs. 500, but they are always paid largely in kind, and the girl in her turn brings with her beads". A girl whose virtues such as thrift, knowledge of weaving, good and hard agricultural work etc. are widely known commands a higher price. The Sema Nagas of Margherita (5) formerly used to pay bride-price in mithuns, but now they pay it in cattle, pigs and paddy. Most of the Angamis (6) pay a bride-price which is merely nominal, "a few chickens, a couple of pigs, and a spear, but in some of the Chakroma villages, Chephoma, for instance, sums of Rs. 2 to a 100 rupees are paid". Among the Yumchingar Nagas (7) of Tuensang division of the Naga Hills "love-marriage are not frowned upon by the society. Bride-price is a must in all matrimonial affairs. The bride-groom has to give mithuns (wild bisons) to the bride's father in exchange".

The Kuki-Lushais

We may turn our attention to the neigh-

bours of Nagras, the Lushai-Kukitribes, among whom bride-price is no less a flourishing institution than among the Nagas. The purchase of a bride among them by commuted service is not uncommon and during the probationary period the bridegroom is generally given free access to the girl of his choice. Pregnancy among the Kukis entails no disgrace, but on no account must a girl give birth to a living child in her father's house and to avoid such untoward incidents infanticide is occasionally resorted to. (8) Speaking of them an earlier writer informs us that the service is for 3 years in the prospective father-in-law's *jhum* fields, practically becoming a bond servant, at the end of which he being allowed to marry the girl; but even then he is not free to take the girl home as he has to remain another two seasons working in the same manner as he did before. "At the completion of the five years he is free to build a separate house and start life on his own account. Two rupees is the sum ordinarily paid to the parents of the girl, a sum evidently more for the purpose of proving a contract than for anything else, the long period of servitude being the real price paid" (9). A Jansen (a sub-tribe of the Lushais) youngman is saved from the drudgery of serving for his wife; for, he is allowed to purchase her.

A young Lushai (10) of the Mizo Hills can pick and choose any woman except his own sister and mother. The bride-price is made up of a number of items such as the *Manpui* (the principal price, reckoned in terms of mithun, varying according to the family status of the bride and sometimes from 3 to 10 mithuns); *Pushun* (the perquisite of the nearest male relative on mother's side or of a person specially chosen as the bride's *pu* or

protector, the amount varying from Rs. 4 to Rs. 10 etc. Marriage by service together with payment for bride is found among the Aimol, Anal, Chiru, and Purums, some of the old Kuki tribes; in case of service the period varying from 3 years upwards. Bride-price, among the Anal and the Purums, must not be less than a pig and a piece of iron a cubit in length, but the girl's relatives try to get as much more as they can. The Chiru girls are only valued at one gong. Among other clans, marriage is by simple purchase. A Chawhte maiden can be obtained for a spear, a dao, and a fowl, the payment being sealed by consumption of much *zu* (rice-beer). The price of a Kolhen girl is a gong and Rs. 7 to her mother and Rs. 7 each to the elder and younger brother and the maternal uncle. Tae Kom girls are valued very high, the father receiving one gong, four buffaloes, fifteen cloths, a hoe and a spear, the aunt taking a black and white cloth. A Lamang bridegroom has to pay his father-in-law three pigs or buffaloes or cows, one string of conch-shell beads, one lead bracelet, and one black or blue petticoat. A Tikhup father expects a gong, ten hoes, one dao and one spear, the maternal grandfather's demand being Rs. 7. The price of a Vaiphei girl varies between two and ten mithuns. Among the Ngente clan of the Lushais, the bride-price is fixed at seven guns, which are taken as equivalent to Rs. 140. The *Manpui* the principal item of the price of a wife among the Rangte Clan is one blue cloth, one mattress and three mithun. The price of a Taran (an old Kuki clan) is a gong or Rs. 30 or five years' service in the girl's father's house. The Ronte maiden's price is two gongs, and her proper husband is her maternal first cousin. The Thado Kukis also pay for the bride, the amount varying from 3 to 30 mithuns according to her

family status. Although a man has paid the full price for his wife, yet he has, on her death and the death of each of her sons, to pay a further sum called '*longman*' to her nearest male relative. Children of the same mother by different fathers may marry among the Lakhers (11) — an old Kuki sub-tribe. The bride-price to the bride's father or brother is Rs. 584/- beside's maternal uncle taking Rs. 189 (+ Rs. 62), bride's mother receiving Rs. 98 (+ Rs. 22), Rs. 88 being taken by the bride's mother's youngest sister (+ Rs. 6), bride's paternal aunt's share being Rs. 83 (+ Rs. 11) and last but not least the share of the bride's paternal aunt and herself being Rs. 43, the sums in the brackets being paid extra in case the bride-groom is from another village. The maximum amount payable, including extra dues to be paid, the bridegroom belongs to a different village, is Rs. 1159. "There is no bridegroom or bride-price among the Purums (12)", writes Prof. T. C. Das, "the only way to secure a wife is to serve the prospective father-in-law for a period of three years, and no commutation of service by cash payment is allowed".

Tribes of Nefa

The North-East Frontier Agency area is a fertile ground to conduct anthropological investigations. We are only slowly coming to know of the peculiar institutions of the tribes of that area. Bride-price seems to be a must among all the tribes of NEFA. "It is the custom for the lover among the Padams", says Col. Dalton (13) "to present his mistress and her parents such delicacies such as field-mice and squirrels". Among the Padams and Minyongs (14), two sub-tribes of the great Abor or Adi tribe, who inhabit the eastern part of the Siang Frontier Division of NEFA, "bride-price (*are*) takes the

form of continued supply of meat by the husband gives his entire share of fish caught in organized fishery and half of his catch by a trap or rod; of rats and squirrels caught half the number goes to the girl.. besides rendering service to the father-in-law in exchange of the hand of his daughter. The Aka bridegroom (15) has to pay mithun and pigs to his father-in-law as dowry. Among the Miris of the Subansiri Frontier Division, "bride-price which consists, if the damsel be of a high family of two or three mithuns, twenty or thirty pigs, fowls," etc. which may be paid in instalments. The Mishmis (16), who are polygynous and among whom the number of wives is an index of the economic power of a man, purchase as many wives as they can afford to, "the price ranging from a pig to a bonus of twenty oxen". Among the Chalikata Mishmis (17), "marriage ceremony there is none" Col. Dalton believes; "it is only an affair of purchase, and the women thus obtained, if they can be called wives, are not much bound by the tie". On payment of part of the purchase money, the youth may marry and visit his wife at her father's house (18), besides presents of *sikra daos*, kanchis, pigs or what not (19). The Sinpho (20) youngman is prohibited to marry his own mother or sister, but he may marry his stepmothers, brother's widows, or even other relative. Marriage-price consists of a present to the parents of the bride with a Khamtee Dhao or short sword a velvet jacket, a silk Dhota and a slave; the rich give gold and silver, buffaloes and as many slaves as the wealth of the bridegroom will permit. The Limbus and Kirantis (21) of Bhutan border have to buy their wives; those who are too poor to pay in cash serve like Jacob till they have given an equivalent in labour. The Lepchas (22) of Bhutan

permit marriage on credit, the girl remaining in her father's house and her husband living with her there till he can pay or has earned the money which entitles him to take her home.

Well-to-do Idu Mishmis (23) of Lohit Frontier Division of NEFA may claim the bride-price, *Yaku-bri*, "upto five mithuns, while poor families often actually pay only one or two". In Tangsa (a large tribe of Namchik and Tirap valleys of NEFA) society (24), normally the amount of bride-price is fixed at one hundred rupees and a buffalo".

Hire-purchase seems to be a feature of polygynous Dafla society (25). To a Dafla "marriage is one of the principal devices for securing a favourable place in the network of friendship and alliances on which, wealth, power and life itself depends". Bride-price among them consists of "mithun, pig's meat, one pile of *endi* or other cloth, one *dao*, five bundles of salt and many baskets of fermented millet for bear" (26). The Apa Tani (27) society of the Subansiri Frontier division of NEFA area is divided into Patricians and slaves. Patricians and well-to-do families usually pay a bride-price which varies from one to five mithun, after the couple have lived with each other for sometime. To the Miris (28) of the same locality, the ceremonial marriage '*neida*' establishes a lasting and socially significant bond between the families of husband and wife. The bridegroom pays a high bride-price, sometimes upto 20 mithuns, and the father of the bride is expected to match the value with a dowry consisting of ornaments, precious Tibetan bells and sometimes even a slave.

People of the Valleys of Assam.

Miris of the Brahmaputra valley (29) have not altogether dispensed with the payment of

bride-price. "In earlier days" write a recent writer "a mithun or its equivalent of Rs 100 or so was charged as bride-price (*alig*) payable to the bride's parents, but lately the amount has come to much variation and some have totally abolished the custom.

The Kacharis (30) after selection of the bride pay a visit to the prospective brides parents, taking with them certain presents in the form of rice, liquor, betel-nut etc. and formally ask for the hand of the bride. The bride-price (*gadhan*) in Darrang district "rarely exceeds Rs 40 to Rs 60 though in Kamrup it is said to be often double these sums... ." "The stipulated bride-price need not be paid at once, nor does the actual union take place for some months. This payment can also be substituted by equivalent personal service at the prospective father-in-law's house which varies from three or four to upwards of 12 or 15 years, cohabitation being allowed after about 12 or 18 months." Matrilocal residence for the whole life of the bridegroom is not unusual. The Rabhas, an allied tribe of the Kacharis, pay for their brides or serve for her. The Hajongs of the slopes of the Garo Hills, who too have ethnic affinities with the Kacharis, pay a bride-price (*pan*) of from 20 to 100 Rupees to the bride's parents or the equivalent in personal service. Similarly, the essential element in a Mōran marriage is (1) "payment of bride-price (*pan*) of sums Rs 20 to 100 to the girl's parents, and (2) the giving of a feast at the bride-groom's expense to the parents and relatives of the bride". A bride-price varying from Rs 10 to Rs 100 must be paid to the parents of the bride or an equivalent in personal service among the Chutiyas (Hindu, Ahom, Deori and Barali Chutiyas). If the wedding among the Mikirs (31) is *akejoi*, that is if no payment is to be made for the bride, the girl goes with her husband next day to her new house.

Conclusion

A comprehensive survey of the bride-price as an institution among all the people of Assam has not been attempted here. My intention is only to show how deep-rooted is this institution among some of the dominant tribes of Assam.

Space does not permit enumeration of the practice in other parts of India. My purpose here is limited in so far as I want to acquaint the students of Hindu Law to equip them for the proper appreciation of the bitter chagrin of the Aryan law-givers against such a utilitarian institution of the aboriginal people of India.



*Try to expand.
Remember the only sign of
life is motion and growth.*

Income and The Income-Tax Act, 1961

BY

SANWARMALL PITHISARIA

Class—IIIyr. Sec.-C Roll No. 31

“There is always a possibility of finding in the twists and turns of the Income Tax maze some relief or refuge for the harassed taxpayer, and this possibility we must now examine.”

Lord Maugham.

It has become an established rule of law that in a taxation statute there must be a subject-matter which is intended by the Legislature to be charged. In our Indian Income-Tax Act, 1961, “income is the subject-matter” (vide Section 4). Only to provide a subject-matter is not sufficient on the part of the Legislature, but it is also expected from it to insert an comprehensive and explanative definition of the subject-matter in the Statute. This is because nothing can be taxed until and unless it comes within the purview of the definition. In this regard the observation of Rowlatt, J., in *Cape Brandy Syndicate V. I. R. (1921) I. K. B.*, is worth perusal. In a taxing Act one has to look merely at what is clearly said. There is no equity about a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

Our Legislature has done its utmost to interpret the term ‘income’, but only an inclusive and not exhaustive definition has been inserted in our New Act. The definition reads as under:.....

Section. 2(24)...“Income” includes.....

(i) profits and gains ;

(ii) dividend ;

(iii) the value of any perquisite or profit in lieu of salary taxable under clauses (2) and (3) of Section 17 ;

(iv) the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by the relative of the director or such person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid ;

(v) any sum chargeable to income-tax under clauses (ii) and (iii) of Section 28 or Section 41 or Section 59 ;

(vi) any capital gains chargeable under Section 45 ;

(vii) the profits and gains of any business of insurance carried on by a mutual insurance company or by a co-operative society, computed in accordance with Section 44 or any surplus taken to be such profits and gains by virtue of provisions contained in the First Schedule.

“Income” includes not only those things which this sub-section declared that it shall include, but such things as the word signifies according to its natural import. *Raghuvanshi Mills Ltd. V. C. I. T. (1952)*. This sub-section deviates at many places from the natural

connotation of the term. As for example, capital gains are included in the definition (vide Section 2 (24) (vii)), but in natural sense they are not income. Thus by insertion of such an inclusive definition, our Legislature has attempted to expand the natural connotation of the term by enumeration of artificial items and in this way sought to assist the National Exchequer.

Generally, income has been stated as the annual or periodical yield in money or reducible to money-value, arising from the use of real or personal property, or from labour or services rendered. Dividends, interest on investments and rents derived from houses and lands, are instances of income arising from the use of property, whilst salaries, wages and other professional earnings are instances of income arising from labour or services rendered. Income derived from business may in certain cases be a combination of both the classes.

There is only an inclusive definition in our Income-Tax Act, 1961. Hence, it is not easy to grasp a clear concept of the term without undergoing the judicial observations.

The leading case, which may be referred, on this point is that of *C. I. T. V. Shaw Wallace & Co.* 1932 P. C. 138. where Sir George Lowndes has given definition of income in these words... "Income connotes a periodical monetary return coming in with some sort of regularity or expected regularity from definite sources. A source need not necessarily be one which is expected to be continuously productive, but it must be one whose object is a production of a definite return, excluding anything in the nature of a mere wind-fall."

Following this definition Lord Russell of Killowen in *Gopal Saran Narain Singh*

V. C. I. T. (1933) has made the following statement... "The word 'income' as used in the Income Tax Act is not limited by the words 'profits and gains' and in order that income may be taxable it is not necessary that it should constitute or provide a profit or gain to the assessee. Income means a periodical monetary return coming in with some sort of regularity from definite sources as laid down in *Shaw Wallace's* case and anything which can properly be described as income is taxable under the Act unless expressly exempted."

In *Kamakhya Narain Singh V. C. I. T. (1943)* Lord Wright observed that whether a receipt is income or not would depend upon circumstances of the case, as for instance, the profits on sale of shares made by an investor or by a dealer in shares."

Whether a particular receipt is a revenue receipt (and therefore income) or a capital receipt is often a difficult and perhaps impossible task as the dividing line may be thin and the case law on this point is voluminous. Supreme Court in *Board of Agricultural Income Tax, Assam V. Sindhurani Chaudhurani, 1957*, remarked that 'an income receipt is not necessarily recurring nor a capital receipt single; for instance, a premium or salami for a mining or other lease would be a capital receipt in the hands of the lessor even if it is paid in instalments.' It is not possible within the scope of this tiny work to deal with the topic exhaustively, and it is next to impossible to give an exhaustive definition of the term 'income'. But probably the best definition is one given by Mr. Justice Pitney in *Eisner V. Macomber (1959)* 252 U.S. 189. He said "Here we have the essential matter not a gain accruing to capital, not a growth or increment of value in the investment but a gain, a profit,

some thing of exchangeable value proceeding from the property severed from the capital, however invested or employed, and coming in, being derived, that is, received or drawn by the recipient, the taxpayer for his separate use, benefit, and disposal, that is income derived from property; nothing else answers the description.'

*"Not like the brazen giant of Greek fame,
with conquering limbs astride from land to land ;
Here at our sea—washed, sunset gates shall stand .
A mighty women with a torch, whose flame,
Is the imprisoned lighting, and hername.
Mother of exiles."*

Crime and the Criminal

BY

SUHRID BASU MALICK,

3rd Year Law.

Crime is a hydra-headed monster. Its tentacles reach far and embrace all walks of human life. It presents a problem not only to the public, the judge, and the lawyer but also to the criminal himself. Crime, Criminal and broadly speaking, criminology has made a hypnotic and hectic spell upon the minds of men since the dawn of human civilisation. If we look at the present complicated world we will find that man's mind is vitiated and everybody is running after satisfying one's own ends and the number of committing crime is increasing rather than decreasing. 'For achieving one's own end one cannot hesitate to make an end of the life of one whose demise is the only way of satisfying his own end. The intention, motives, wishes, desires and lust of a criminal are quite different from the one who is normal human being. What is most interesting is the fact that judges who are ordinary human beings try the case of a criminal and sentence him to death who is also a human being. But the fact is that criminals become abnormal and lose human temperament at the time of committing the crime. Hence we can say that criminals are different from the ordinary human being—because their mental set-up and outlook is different. The criminal, like other people, has lived a life of instinctive drives, of desires, of wishes, of feelings, but one in which his intellect has apparently functioned least effectually as a brake upon certain trends. His constitu-

tional make-up deviates toward the abnormal leading him into conflicts with the laws of society and its cultural patterns.

In this context any definitions about the criminal will not be meaningless. Criminals may be defined as irritable, frequently incorrigible and stupid fellow. Criminals lacked insight, felt no remorse, was unstable and vain, and that nature had created this individual with the subhuman anthropological and anatomical features of a criminal a *res nata* (the born criminal). Criminals can be broadly divided into three classes; the insane criminal; the criminal by passion; and the occasional or accidental criminal.

By "Criminal by passion" we mean a person who is characterized by unusual affectibility which under certain conditions might lead into crime.

The "occasional criminal" be divided into three types:—the pseudo criminal; the habitual criminal; and the criminaloid. The pseudo criminal is a person who committed a crime under extraordinary and irritating circumstances. The habitual criminal characterized one who is normal at birth but who from early childhood had been repeatedly exposed to detrimental environmental influences which in due course produced a deviation in conduct from that of a law-abiding citizen. The criminaloid is a transitional type between the

born criminal and the occasional criminal ; he is not actually a criminal but a person who was tempted into crime under unfortunate circumstances.

This psycho-analysis will lead one to believe that any normal human being can be exposed at any time to the disequilibrating forces operating in his mind and he will not hesitate to do any such thing subject to rigorous punishment. Emotions, motives, intentions these are the things which play a vital role in inducing a person to transgress the sacred rules of human society.

Crime may be considered a product of a person's tendencies and the situation of the movement interacting with his resistance. As against this, it can be said that it is not the tendencies and resistance embodied in the structure of the individual which carry him into crime nor the situation as such, but the fact that he is functioning in the wrong set-up.

Since crime is more or less the result of ingrained human tendencies, we must ask : why do only certain people become criminals ? The answer is that certain coincidences of internal and external relations are necessary before a man becomes a criminal. And that a certain coincidence of situation and anti-social tendencies must exist to lead one to commit a crime.

"Bad environment" also leads man into crime. Being frustrated not having any sort of employment man sometimes surrenders to the criminalistic tendencies and had to steal or commit burglary in order to live.

"Heredity and environment" become the causes of crime. Let it be stressed that the problem of which has the greater influence in causing crime—heredity or environment—is an academic question. But in many cases it has been found that ingrained human tendencies

may be largely influenced by environmental factors.

Let us once again classify the offenders. We can divide offenders into momentary or acute offenders ; and chronic offenders.

1. Momentary offenders—The momentary offender commits a crime just once or twice, only under certain circumstances. We have three following classes of momentary offenders :—(i) situational offenders ; (ii) accidental offenders ; and (iii) associational offenders. These people are not in reality criminals. We designate as criminals only those who have shown a consistent anti-social attitude and repeatedly have been transgressors of the law.

Of the three types the first one, the situational offender may perform a crime because an overwhelming opportunity arises, or because of a compelling situation. To the situational offender are ascribed those crimes committed because of opportunity. It has been said that opportunity makes the thief.

The accidental offender runs unexpectedly into difficulties with the law through mistake or chance. Careless driving or thoughtlessly throwing away a burning match may perhaps place an otherwise honest man in a predicament.

The importance of the third type of offenders associational seems to have been greatly overlooked. This sort is not only influenced by his own criminalistic tendencies, no matter how weak they may appear, but also by his immediate surroundings when certain situations arise.

II. Chronic offenders :—A criminal pattern has started to develop in the personality when an acute offender commits a second or a third crime. Such a pattern may become more and more deeply ingrained in the individual, so that

finally a definite criminal characteristic is evolved. If that is the case, a chronic criminal is produced. Chronic criminals are subdivided into (i) chronic situational, accidental and associational offenders, (ii) neurotic and compulsory offenders.

Since the different group of offenders do not concur with the laws of society, they change their anti-social activities in accordance with the opportunities offered to them. One could say that their crimes are an occupation. Socially, such an offender is the most dangerous individual, operating when certain situations arise, on a large scale, as in racketeering.

After analysing the chief characteristics of offenders it would not be a futile task to turn once again to the discussion of "Murder". The general background of murder will be more or less characterized by those factors that cause crime in general, murder has psychological root in the person's aggressions related to attack and defense. These are expressions of his fight for survival or may be due to an erotic drive, no matter how distorted or concealed it may be. Frictions and conflicts which under the strain of life brought forth anti-social activities, including homicide.

Murder can be divided into two parts:—
(A) Symptomatic murder and (B) Manifest (essential) murder. And symptomatic murder can be classified under the following headings: (I) Murder due to a distorted erotic drive, which can be divided into (a) jealousy murder, and (b) murder due to the aggressive drive, which can be divided into (a) alcoholic murder (b) surrogate murder (c) murder due to physical inferiority.

(B) The manifest (essential) murder can be classified as (a) profit murder and (b) murder from motives unknown, crimes of this sort are committed primarily against society. The

murders come from that bracket of society which identifies itself with crime in general and homicide in particular: (a) profit murder—Persons who commit this type of murder act in accordance with their special concept of life and of the rules of society. The motive of personal gain is obviously present as is seen in the murder rings.

(b) Murder from motives unknown—To this class belong homicides in which the murderer is undetected or the murder is surrounded by such a complex of factors that the motivation can not be determined.

A way to find the potential murderers would be to establish clinics and like such other arrangements in which all anti-social persons would be examined and receive treatment. This task is great and seems to be impossible because it is really difficult to bring all the anti-social persons into the clinics where examinations of the offenders will be made, but considering the number of homicides committed every year causing unspeakable suffering to the persons involved and producing serious damage to society, it would in view of saved lives and saved happiness be more than worth the expenses.

A workable solution should be found out to prevent the commission of crime. A crime prevention means an effort to decrease or obliterate crime so that society will be safer. The success or failure of a crime prevention program largely depends upon the interests, ability, character and personality of the people engaged in crime prevention. Crime prevention has been practised for many years through enforcement of law; law enforcement depends upon an overt act of crime. The theory is that punishment for infractions of law will curtail crime. In some classes of crime like prostitution, gambling, liquor law violations, arson and

burglary, an arrest is the exception rather than the rule, while convictions and punishments are rare. It is because of the lack of evidence to convict. Because of inadequate punishment crimes have progressively become more serious in nature. Law enforcement as a preventive of crime depends upon its ability to prove that crime is a losing proposition.

Arrest alone is sufficient to deter a large number of persons from further crime. This is proved by the fact that by far the great majority of first offenders do not repeat their violations. Arrest, the chief weapon of the police is worth while as a crime prevention method. Conviction and punishment tend to establish a respect for the law.

The aim of crime prevention is to prevent the origin of criminal motives by providing and encouraging environments that will encourage right living. The individual needs to be surrounded with environmental influences that will provide good moral and spiritual values

and thereby prevent criminal motives from originating.

In fine, it can be said that what is of supermost necessity for the prevention of criminal action is the incorporation of scientific approach to the problem concerned. And a proper harmony should be made between law and scientific approach to crime. The primacy and prestige of the society can be reached and order be maintained only when law and science go hand in hand in establishing Concepts by which Society can be governed. But the law and the legislators will have to reckon with the concepts of truth and justice that live within the people. The behaviour of the individual, be it a personal or a Social maladjustment, is only a reflection of how disorganized a Society is. A high Social order can be reached only when mental and Social abnormalities are at a minimum. The law, based upon the knowledge of the human mind can guide and educate the public about the meaning behind it. Then will the law Succeed in its Supreme task :



*We have wept long enough ; no more weeping,
but stand on your feet and be men.*

Indian Constitution at Work

BY

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2nd Year Class

Mr. Podsnap said to the French gentlemen in our *Mutual friend*: "We Englishmen are very proud of our Constitution, Sir. It was bestowed upon us by Providence. No other country is so favoured as this country".

"And other countries", said the foreign gentleman. "They do how?" "They do, Sir" returned Mr. Podsnap, gravely shaking his head, "they do - I am sorry to be obliged to say it - as they do". Such a people as the English has no need of a Constitution. But other countries do as they do. This being so, India follows in the footsteps of these other countries in having a written constitution of her own.

I Constitution—What it is :

The word Constitution is used in two senses. In its wider sense, it means the whole system of Government of a country and as such it includes both legal and extra-legal rules regulating the Government. In the narrower sense it means a selection of fundamental principles of Governmental organisation. It is in this latter sense that the Indians on 26 November, 1949 declared : "We, the people of India.....do hereby adopt, enact and give to ourselves this Constitution".

Indian constitution shows the ring-dance of the legislature, executive and the judiciary in a remarkable way. The public will is voiced by the people's representatives in legis-

lature ; laws and ordinances are its formal records. The executives constitute the channel through which this legislation is put into effect, while the judiciary upholds their hands by providing the necessary sanction of enforcement. Constitution thus appears as a Trinity in one and one in Trinity. Of this Trinity the legislative is the prime mover in the show. And "Law-making" rightly says Poof. Ernest Barker, "is the process of the grand dialectic of public debate, in which thought clashes with thought until a reconciling compromise is found, which we can all accept because we can all see some little elements of our thought, some little reflection of ourselves in the lineaments which that compromise presents".

II. Relation between Legislature and judiciary :

The Indian Constitution neither adopts the Parliamentary sovereignty nor the judicial supremacy. It is a compromise between the English and the American models, though it leans more on the side of the legislature. This has become evident in the activities of the Parliament and the Supreme Court. The Constitution gives the judiciary powers to declare a law unconstitutional if it is beyond the competence of the legislature as per the distribution list or it contravenes the fundamental rights. Besides, the "judicial review" is

applicable to Art. 19 of the Constitution and the Judiciary can declare a law ultra vires if it finds it an "unreasonable" restriction on the seven freedoms guaranteed therein. The Supreme Court has upheld this contention in *Chintamanrao V State of M. P.* (1950): "The determination by the legislature of what constitutes a restriction is not final or conclusive, it is subject to the supervision of the Court".

Although the judicial supremacy is there, it is a limited one. The Indian parliament is sovereign and its dominion extends over the judiciary as well. Thus the interpretation of clause (2) of Art. 19 given by the Supreme Court in (i) *Ramesh Thapper Vs State of Madras* (1950) and (ii) *Brij Bhusan Vs State of Delhi* (1950) has been superseded by the Parliament in the Constitution (First Amendment) Act, 1951, and 'Public order' and 'incitement to an offence' inserted there. A 3rd instance is provided by the Supreme Court's interpretation in the case, *State of West Bengal Vs Subodh Gopal* (1954) and its supersession by the Constitution (4th Amendment) Act, 1955 to facilitate agrarian reforms.

The American Judiciary is independent in its own sphere and rightly called the "balance-wheel" of the Constitution. Truly "the Constitution is what the Supreme Court says it is". It derives its powers from a fundamental principle, called the "due process of law". It goes back to Art. 39 of the Magna Carta of England and first appeared in this form in a statute passed by Parliament in the 14th Century (28 Edw. III. 3.). It then passed into the constitution of the U. S. A. as a part of the 5th Amendment (1791): "No person shall be deprived of life, liberty or property without due process of law".

Indian judiciary, it would appear, has not been given this supremacy. In place of "due

process of law", the Indian Constitution has inserted a clause from Act XXXI of the post-war Japanese Constitution: "no person shall be deprived of his life or personal liberty except according to procedure established by law" (Art 21). Here is the supremacy of law in preference to the judicial review. The late Dr. Ambedkar visualised the issue of politicians versus judges thus:

"I cannot altogether omit the possibility of a legislature packed with party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how 5 or 6 gentlemen sitting in the Supreme Court examining law made by the legislature and by dint of their own individual conscience or their bias or their prejudices can be trusted to determine which law is good or which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla". (Constituent Assembly Debates VII. 999-1001).

The Constitution decides the issue in favour of the legislature by substituting "procedure established by law". In *Krishnan Vs State of Madras* (1951) the Supreme Court explains this clearly: "It is open to Parliament to change the procedure by enacting a law and that procedure becomes the procedure established by law within the meaning of that expression in Art. 21 of the Constitution".

III. The relation between legislature and

Executive :

The Executive—"President and Governors"—is given powers legislative and judicial in addition to its own. Arts 72 and 123 in relation to the President and Arts 161 and 213 in respect of the Governor are relevant in this connection. The twelve year experience has

developed certain conventions. It has bearing on the relationship between the President and his Council of Ministers and also on that between the Governor and his Council of Ministers. As a result, the President has not turned out a dictator as visualised by Mr. Gledhill in his "Republic of India". He has given a picture of a President who without violating the Constitution establishes an authoritative Govt. He dissolves Parliament, appoints a Ministry, starts issuing ordinances, proclamations, suspends fundamental rights and uses armed forces as commander-in-chief and all in a constitutional manner. Mr. Gledhill remarks : "this may seem a night-mare but it is not dissimilar to the way in which the Weimar constitution was destroyed". But the constitution wants the President to quote Ambedkar to be "merely a nominal figure head—(who) has no discretion and no powers of administration at all".

It thus becomes pertinent to get at the real position of the President in the Indian Constitution. A comparison of different constitutional Heads of State will make this clear. The American President is considered not only the Head of the political system but also of the national life. In the words of Laski : "The President is both more or less than a king ; he is also both more or less than a Prime Minister" (American Presidency).

India has a constitutional President superimposed on the Parliamentary system of the British type. She has a President of the Irish model with a difference viz. an elected President acting on the advice of ministers responsible to the legislature. While he will have no "functions" to discharge himself and no powers to override the Ministry, he would have the "duty" to advise the Ministry not as a representative of any party but of the people

as a whole to secure an impartial, pure and efficient administration. In relation to the Ministry in office this duty will be according to the Late Dr. Ambedkar two-fold : "One is that he has to retain the Ministry in office because the Ministry is to hold office during his pleasure. The second duty is to advise the Ministry and suggest an alternative method of dealing with a problem and ask them for reconsideration of decisions". (Constituent Assembly Debates Vol-VIII, p. 545).

Art. 74 (1) provides for a council of Ministers with the Prime Minister at the head to "aid and advise" the President. There is no provision in the Constitution to compel the President to act according to the advice of the Ministry. On the other hand under Art 77 (2) he is authorised to make rules as to how orders and other instruments are to be authenticated.

Now the words—"aid and advise"—supply the key to the problem. There are bodily taken over from the British North America Act. The expression was imported into the Canadian Constitution from the British Cabinet Govt. to transform the Governor-General into a Constitutional Head to act on the advice of the Cabinet. The Indian President also has been transferred from the Gledhill dictator into the Constitutional figure head.

To make the president a nominal figure head, the legislature-viz. Parliament—is given a big say in the election. He is not directly elected by the people but the members of the legislatures elect him. Besides he is liable to impeachment by Parliament. These two provisions turn him into a Constitutional Head. The real position is that he is not "the majesty of the people incarnate," but a nominee of the legislature. The Governor is a nominee of the President. His powers are thus further narrowed down. The people are primarily in touch with

the legislature, that deals with the executive. In fact, the executive head is recruited by the legislature. Hence people are in indirect touch with the executive. The executive has two parts—the State and Govt. The President mans the State; the Ministry the Govt. One is a sitting idol; the other a moving idol. Both are complementary.

IV. Relation between Executive/Judiciary :

The President appoints the judges as a constitutional Head. Still the judiciary is made independent. Art. 143 confers consultative function on the Supreme Court. Under Clause (2) it is obligatory on the Supreme Court to entertain a reference and to report to the President its opinion thereon; but under clause (1), the Court has discretion in the matter and may in a proper case decline to express any opinion on the question submitted to it (Re. Kerala Education Bill, A. 1958, S. C. 956).

The Supreme Court decisions are under Art 141 made binding on all courts in India. They are to be followed even though they appear to be contrary to the decisions of the House of Lords or of the Privy Council (I. T. Commissioner-Vs-Srinibai, A. 1956). It has also been held that the obiter dicta of the Supreme Court constitute 'law' within the meaning of Art 141 (Ram Surat V Ram Murat, A. 1959).

In a conflict between the executive and the judiciary powers the latter has been held to prevail over the former in K. M. Navavati V The State of Bombay (Maharashtra)—(S. C. A. 24, 1961). The two articles 161 and 142 operate in two distinct fields where different considerations for taking action apply. That is how they are reconcilable and should be reconciled. The power of pardon given to the Governor is a

"specific power" whereas that given to the court under Art 142 (1) is a "general power". Art 161 does not deal with the suspension of sentence during the time that Art 142 is in operation. The order of the Governor, it is held, can only operate until the matter becomes subjudice in the Supreme Court on the filing of the petition for special leave of appeal. The opinion expressed in Berubari Union, 1960. S. C. to the effect that Art 3 (c) is restricted to inter-State adjustment and does not apply to cession of territory in favour of a foreign state has been made binding on the executive as well.

V. Theory of Constitutional Trust.

Art. 53 of the Constitution vests the executive power in the President. But the constitution does not specifically vests the Legislative and Judicial power in the Parliament and the Supreme Court. This indicates that the constitution framers did not intend the constitution to be based on the theory of separation of powers as was done in case of the U. S. Constitution. By making the President or the Governor to act on the advice of his Council of ministers responsible to the Legislature, the principle of ministerial responsibility is introduced. This makes the separation of powers nugatory.

Again, it is seen that Indian constitution has been built round the principle of fusion, and not, of fission. The President or the Governor is given powers to make ordinances during recess of the legislature. Under a proclamation of emergency the President under Art. 357 may be vested with legislative powers of the State Legislature. The President or the Governor is also given judicial powers under Art. 72 or Art. 161 to grant pardons and the like. Similarly the judiciary may be vested with legislative powers under Art. 140.

Although there is no strict separation of powers, it is not possible for any organ of Government to encroach upon the sphere of another or delegate its constitutional functions to any other authority. A written constitution, by its very nature, has to make proper distribution of powers among its various organs. Hence, the three main organs—executive, legislature, judiciary—are normally to discharge their functions within their own sphere unless an exception is made in favour of one or the other. It is this exception that confirms the rule. There is thus “constitutional trust” imposed upon the legislature and the courts which they cannot, themselves, delegate to others. (In re Delhi Laws Act, 1912 (1951) S.C.R. 747). This follows from the legal maxim: “Delegates non potest delegare” (a delegate cannot delegate). Thus the State Legislature is not a delegate of the Union Parliament. Both derive their powers from the same Constitution. Hence, one legislature cannot, by delegation of subjects that are exclusively within its field, clothe the other with legislative capacity to make laws on that subject.

VI : Delegated Legislation :

American constitutional lawyers refer to a famous syllogism on the delegation of legislative power proposed by prof. Cushman which runs as follows :

Major premiss : Legislative power cannot be constitutionally delegated by the Congress.

Minor premiss : It is essential that certain powers be delegated to administrative officers and regulatory commissions.

Conclusion : Therefore, the powers thus delegated are not legislative powers.

The position is different in the United Kingdom. In spite of much criticism, it has been generally accepted since 1932 when the committee of ministers' powers (set up in 1929) recommended that delegated legislation has come to stay for the following reasons : (i) pressure on parliamentary time ; (ii) technicality of subject matter ; (iii) flexibility and (iv) emergency powers.

Indian constitution does neither admit strict separation of powers nor prohibits delegated legislation. The position has thus been clarified by the Supreme Court in re Delhi Laws Act (1951). It is held that the legislature cannot delegate its “essential functions” entrusted to it by the Constitution.

Within the prescribed orbits delegated legislation is now possible. Sub-delegated legislation also is permissible. This is the case where the legislature has already laid down the policy and empowered the delegate to redelegate the function to sub-delegates as specified in the Statute itself (Harisankar Vs. State of M. P., A. 1954, S. C. 465).

Delegated legislation is further distinguished from “conditional” and “subordinate legislation.” “Conditional legislation” comes in where the legislature after laying down the legislative policy, leaves it to the judgment of a local administration to introduce the Act in a local area or to determine a contingency or event upon the happening of which the legislative provisions are made to operate (Bhatnagar Vs. Union of India, A., 1957, S. C. 478). When the legislature lays down the policy and leaves it so a subordinate agency the powers of making rules and regulations for filling in the details, it is styled as “subordinate legislation” (Hamdard Dawakhani Vs. Union of India, A. 1960 S. C. 554). Publication is essential for the validity of

subordinate legislation as has been laid down in *Harla Vs. State of Rajasthan*, 1952, S. C. R. 110).

VII. Relation between Fundamental Rights and Directive Principles.

While the Fundamental Rights are in the nature of the Bill of Rights of the American Constitution, the Directive principles of State policy are non-justiciable and taken from the constitution of Eire. The latter embody the aims and objects of a "Welfare State" and make out a case against a mere "Police State" (*Loknath Vs. State of Orissa*, A. 1952, Orissa. 42). The Directives do not create any justiciable rights in favour of individuals and no law is void on the ground that it contravenes any of the Directive principles (*Deepchand Vs. State of U. P. A.*; 1959. S. C. 648). They require to be implemented by legislation. Hence, no one can violate any existing law under colour of following a Directive (*Mangru Vs. Commissioners of Budge*, 1951, 87, C. L. J., 369).

It may appear that Directives are merely pious wishes and should have been left out of the Constitution itself. But experience has belied this. It has been held by the judiciary that Directives are essential for determination of the purpose of social legislation. Thus "restrictions" to be imposed on the Fundamental Rights under clauses (2) to (6) of Art. 19 are held to be reasonable if they are enjoined by any of the Directives (*State of Bombay Vs. Balsara*, 1951, S. C. R. 681). Similarly, acquisition of land for achieving an object of the Directives contained in Art. 39 (b) (c) is held to be for a "public purpose" within the meaning of Art. 31 (2), (*State of Bihar Vs. Kameswar*, A. 1952, S. C. 252). It is thus seen that

Directives are now coming to play by and by an important role.

Although Fundamental Rights hold a position superior to the Directives still the latter serve a useful purpose. This consists in determining the scope and ambit of the Fundamental Rights. In this respect the court may adopt the principle by harmonious construction so as to give effect to both, fundamental rights and Directives (Reference on the Kerala Education Bill. 1957, A. 1958, 956).

Directive principles are to be distinguished from the Conventions of the English Constitution. The former is concerned with the economic and social policy, whereas the latter with the machinery of Government, Commonwealth relations and others. The original interim report on Fundamental Rights in India distinguished two types of fundamental Rights—justiciable and non-justiciable. The latter was adopted on the analogy of Eire's Constitution and a Welfare State promoted.

VIII. Interpretation of Constitution.

In England, the previous negotiations of parties are not admissible to ascertain the meaning of an Act of Parliament. The course of a bill in the legislature is not permitted to control the construction of the Act and the intention of law-makers has to be gathered from the words of the enactment itself. But this practice is not rigid. In case of ambiguity, the circumstantial evidence, as to the intention of a signatory to a document is permissible (*Phipson's law of evidence*, 1943, P. 280). Secondly, preparatory work is admissible in some constitutional cases. It is held in *British Coal Corporation Vs. the King*, 1935, A. C. 500 that the statute of Westminster is to be interpreted in terms of Resolutions and Declarations of Imperial Conferences of 1926-30.

In America, debates on the drafting and adoption of the provisions of constitution and its amendments are admissible in aid of interpretation (Cooley's constitutional law 1911, page 195). In France, preparatory work is always admissible to ascertain, in case of doubt, the intention of the legislature. International law admits preparatory work such as records, drafts and the like for interpretation of the provisions of the treaties including the U. N. Charter (Lauterpact: Harvard Law Review p. p. 549-91).

In India, the judges have followed one view point or the other for some years. The majority of the judges on personal liberty issue held the individuals statements of constituent assembly members as admissible in evidence. With regard to the report of the Drafting Committee of the Assembly, says Kania, C. J. : "the report be read must not control the meaning of the Article (21), but may be seen in case of ambiguity". Such a reference is called the "group intention" by American Lawyers and shows American influence on Indian Constitution.

India has not followed *Stare decisis* (Bengal Immunity Co. Ltd Vs. State of Bihar, 1955, S. C. J. 672). The Supreme Court has struck to the "literal interpretation" wherever possible, but it is always reluctant to interpret it in the Spirit of the Constitution". This has led the Prime Minister to say that the Supreme Court could not make itself the "Third Chamber of the legislature". The legislature had thus to override judicial decisions in a number of cases by Amending enactments : Subodh Gopal, Dwarkadas & Saghir Ambed cases vis a vis the constitution (4th Amendment) Act, 1955.

IX-Integral vision.

Indian constitution envisages a Union of States in the global perspective : States Union World. Federation-making here has little resemblances with that in the U. S. A., British Commonwealth or Switzerland. In the U. S. A. federation has been built up from below and on bargaining. So is the case in Canada and Australia. Indian federation has been framed like the U. S. S. R. through a process conducted from above by a mono-party. The U. S. S. R. is a multinational State, whereas India is a multi-community State. The so-called States were not originally independent but are now given an autonomy under the Constitution. India is quasi-federal with a unitary bias. The Federation comes from above. It has been rightly observed by Prof. C. H. Alexandrowier in his "Constitutional Development in India" (1957) at page 169 :

"India is undoubtedly a federation in which the attributes of statehood are shared between the central and the local states. Instead of defining her by the vague term of "quasi-federation", it seems more accurate to exclude her from the category of administrative federations and to consider her a federation with vertically divided sovereignty".

The states are thus formed into an Indian Union. This union cannot remain isolated from the rest of the world. In this one world, the English law has followed Blackstone's doctrine according to which the law of nations is a part of the law of the land. It means that an English Judge will give effect to a law which originates in the usage and practice of central nations in their relations to each other (The *Zomora Case*, 1916, 2 AC 77). American law is also like this. India has also followed this example and deliberately incorporated it

in Art. 51 of her Constitution. The state has been charged with the responsibility of promoting international peace and security,

X. Constitutional Equation :

It was Lord Kelvin who aptly remarked : "when you can measure what you are speaking about and express it in numbers. You know something about it, but when you cannot measure it in numbers, your knowledge is meagre and unsatisfactory". Hence to get an accurate idea of the working of a Constitution, it becomes imperative to see it in terms of mathematics. An attempt at a mathematical formulation is thus made below.

A constitution may be likened to a series circuit, having self-inductance, capacitance and resistance. The source of constant electromotive force is the people's will (P) in a democratic system. This popular will becomes an instantaneous current (P) when passed through the constitutional circuit, having legislature (L) executive (E) and judiciary (J). Then the "constitutional equation" will be—

$$P = L \frac{dp}{dt} + p_j + \frac{Q}{E} \text{ where } Q \text{ is the instantaneous charge on the Executive.}$$

The following facts emerge on the equation :

(a) A Constitution with a smaller judiciary and a larger legislature may "break down". This shows that the legislative has to be canalised through the judiciary that needs strengthening.

(b) The Executive must be made greater than four times the legislature divided by the square of the judiciary.

(c) The legislative must be made smaller than one-fourth of the product of the Executive and the square of the judiciary.

XI. Peep into the future :

Constitutional amendments are drastic

steps. To avoid these, conventions and judicial review may be resorted to. They may grow around the "Constitutional equation" only after proper realisation of its basic tenets. The inter-relationship of the three main organs is the foundation of the constitution, which has been enunciated in the differential equation. A constitution may be likened to the score of an orchestral work. Mere reading will not do—it needs "performance through concerted action". Hence is the necessity for adoption of the constitutional charter to life. Success consists in this realisation and in the development of proper conventions.

Indian union is based on a combination of the federal structure with parliamentary Govt. Hence the future of the first depends, to a large extent, on that of the second. The parliamentary system has been based on a mono-party system with scope for opposition-forming. The three general elections in 1952, 1957 and 1962 have exhibited a tendency towards development of multi-parties. As a result, a bi-party system could not develop. There is no strong opposition-forming. The situation has encouraged political fragmentation. This has called for an important observation from Prof. C. H. Alexandrowich :

"The introduction of a multi-party system is likely to affect the federal structure and to lead to the establishment of a unitary state, undesirable as this may be. It must mean that the political over-fragmentation in the process of opposition-forming at the centre would lead to the degeneration of the federation and would possibly accentuate tendencies to its conversion into a Pseudo-federal state of a unitary character such as exists in some of the South American Republic or in the U. S. S. R. thus it seems that if the federal structure is to be maintained, leadership in the

case of failure of the bi-party system must for the time being assert itself in the form of a retracted mono-party rule to save the normal course of developments."—(Constitutional developments in India, 1957, pp 236-7).

XII—Conclusion.

A Government based on the terms of a constitution is not necessarily Constitutional Government. The latter is something more than the former. It means Govt. according to rule as distinguished from arbitrary Government—it is a government limited by the terms of a constitution. The principle underlying constitutional government is that of limiting Govt. and of requiring those who govern to conform to law and rules. Forces working against constitutional Govt. are external aggression, internal disturbances and financial breakdown as visualised in part XVIII of the Indian constitution relating to "Emergency Provisions". Any body of opinion aiming at establishing omnipotent Government is called "absolutism". It may be enshrined in the constitution but it is incompatible with constitutional Govt. An absolutism advances, constitutional Govt. recedes. The tragedy of the 20th century is that two-thirds of the world's population live under some form of absolute Government.

A question thus poses itself : "Is democracy an essential prerequisite of constitutional Govt.?" If democracy means only universal suffrage or equality of conditions, it is not likely to lead to constitutional Government. Universal suffrage can create and support a tyranny of the majority or of a minority or of one man. De Tocqueville justly said in his

"Democracy in America". "It is easier to establish an absolute and despotic Govt. among a people in which the conditions of society are equal, than among any other." The absolutism of the 20th century has usually been based upon universal suffrage and that compulsory too. A corrective is suggested by Mr. K. C. Wheare : "It is only if democracy means liberty as well as equality that it can be expected with any confidence to produce constitutional Govt. If men are free not only to vote but also to vote for alternative Government to that in power and if their rights even against the state itself are secured, then there is a chance that limited Govt. may exist. In a Democracy men love equality more than liberty, and need by they will throw away liberty to secure equality. If democratic Govt. is to be constitutional Govt. it must preserve liberty. (Modern constitution 1951 p. 205),

In this context, the people have a tremendous responsibility to discharge. They are the repository of power and also its vehicle. The working of a country is constitution, ultimately, depends on the genius of the people. Hence the caveat uttered by the greatest American jurist, Joseph Story in his "commentaries on the constitution of the United States" deserves mention here.

"It (constitution) may perish in an hour by the folly or corruption or negligence of its only keepers, the people. Republics are created by the virtue, public spirit and intelligence of the citizens. They fall, when the wise are banished from the public councils, because they dare to be honest and the profligate are rewarded, because they flatter the people in order to betray them."

Our Union Activities :

General Secretary's Report

Though the report of the General Secretary giving an account of the Union activities is a routine work still the reminiscence of the year just left behind makes the routine work pleasant and interesting. The repetition of the functions stated in the report of the Departmental Secretaries would bring nothing but monotony. I like to state in brief the general activities of the Union. The year just rolled out is significant from various points of view.

The most significant event of the year was perhaps the Chinese aggression on our northern border. The unexpected massive attack on both the sectors of the Sino-Indian border reached the life of India profoundly. Whole nation rose to the occasion under the able leadership of our beloved prime minister. Money, gold, ornaments, poured into the N.D.F. from all corners. Our Union responded to the trumpet call of our Prime Minister. A Defence Aid Committee was formed under the presidentship of Principal Dr. P. N. Banerjee to co-operate with the government in defence measures. More than Rupees five thousand was contributed to the N. D. F. through the Chief Minister Sri P. C. Sen. Out of this about rupees three thousand was given out of the Union fund and Athletic Club. Rupees two thousand was collected from the students of this college by the Union. Our girl students knitted woolen garments for the jawans and hundreds of students registered their names for donating blood. Our students joined N. C. C. with great enthusiasm.

The out-going session witnessed with deep mourn the sad demise of Dr. Rajendra Prasad,

ex-President of Indian Republic and Dr. B. C. Roy, Chief Minister of West Bengal. We mourned the death of these outstanding personalities of modern India in mammoth condolence meetings in the presence of the Vice-Chancellor Sri B. B. Malik. The contributions of Dr. Prasad and Dr. Roy in making of new India were recalled in the meeting. Our Union collected contributions to Dr. B. C. Roy Memorial Fund. Every department of our Union is busy with the various activities for the welfare of students. Our Debate department has organised All India Autosh Memorial Debate Competition after sixteen years. Due to National Emergency we gave up all entertainment programmes. But our social department did not become idle as a result of it. Annual Bengali and Hindi Drama could not be staged but on the occasion of the Vivekananda Centenary a drama titled Vir-Sannyasi was staged. A symposium on "Vivekananda and National Integration" was held. Mr. Justice P. B. Mukharji and Swami Shambhuddhananda spoke on the occasion. In the out-going session we had the opportunity to have distinguished personalities like Sri A. K. Sen, Union Law Minister, Sri P. C. Sen, Chief Minister, Mr. Justice P. B. Mukharji, Mr. Justice D. N. Sinha, Vice-Chancellor Sri B. B. Malik etc. on different occasions.

In conclusion I must offer my sincerest gratitude to our revered Principal Dr. P. N. Banerjee whose fostering care, affectionate patronage helped me immensely. I am duty bound to mention the names of a few inclu-

ding Dr. B. N. Mukherjee, Professor Maused, Professor S. K. Mitra, Professor N. D. Ray, Professor P. C. Chunder, Sri M. P. Basu, whose guidance and hearty co-operation have made me also to run the business smoothly.

Last of all, I offer my thanks to all members of the Working Committee and members of the staff for the active co-operation.

SHYAMAL KUMAR CHATTERJEE
General Secretary

Editors' Report

Our immediate predecessors Shri Prabhakara Jha and Shri Shyamal Kumar Chatterjee had created a very healthy precedent by bringing out an attractive issue of "Law Journal" before summer vacation, perhaps it was for the first time in the history of Law College when Mr. Jha and Mr. Chatterjee had made it possible for Third Year (July) students to have a copy of the Journal prior to their departure from the College. Apart from this, this issue had brought an unparalleled prestige in the legal and literary world.

We do not claim that we have equalled them or have surpassed them—this we leave upon our readers to judge, we have tried our utmost to maintain the traditional shape and prestige of the Journal. It is well-known that our scope is limited and due to the national emergency we had to curtail our budget. So we do not know how far we have achieved the success of our task.

The editors were in difficulties and at one stage it came to such a climax that it was decided to postpone it to a mere convenient time. But due to the encouragement of our friends we ventured to bring it out according to our programme. The most difficult job which came in our way was to persuade our co-friends to contribute their articles. We feel rather

ashamed while writing about it that out of about 3000 students reading in this College only fourteen students took the trouble of contributing their articles for publication—out of which only a few were of our standard. We would have been very happy if we could publish more articles from our co-friends. But we were deprived of this in spite of our repeated requests and encouragements. For the present we only hope that in future our friends will feel their responsibility and will contribute their articles liberally.

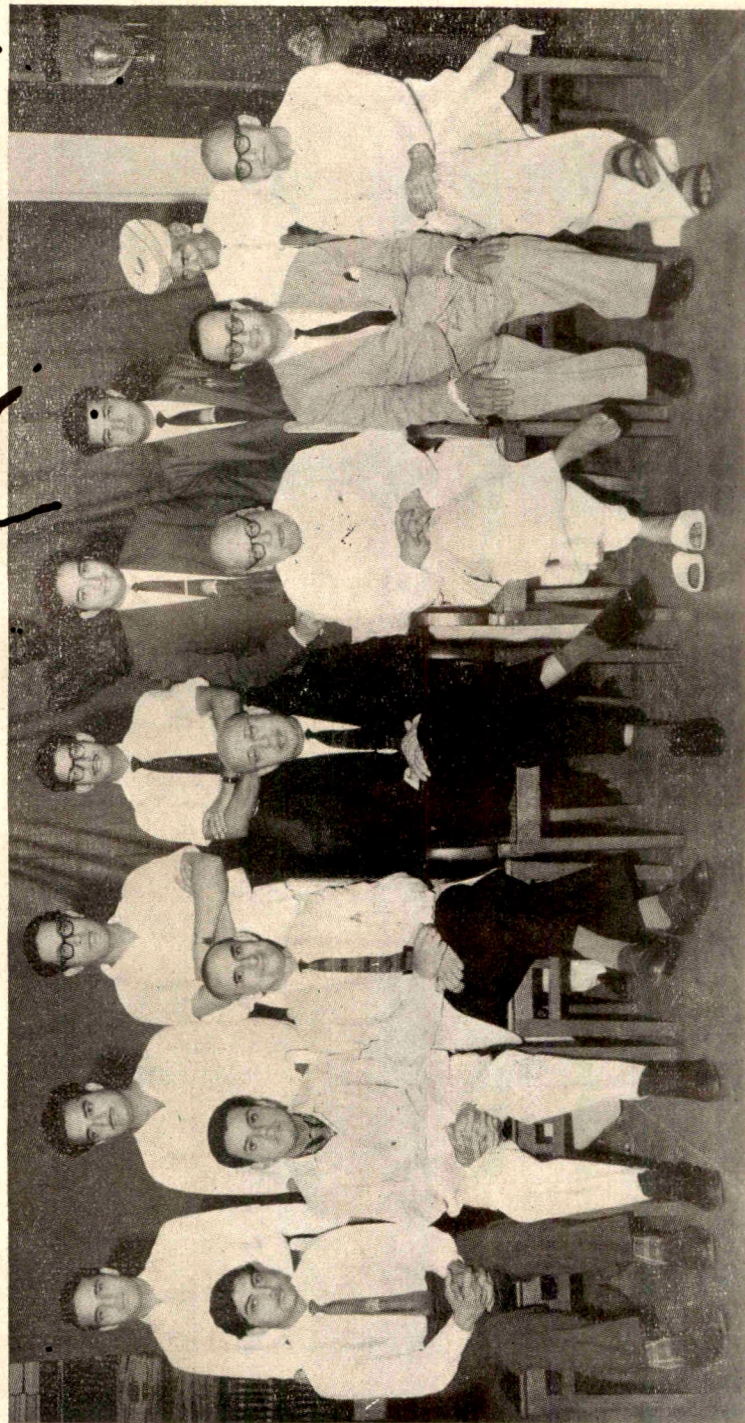
We tried to organise the "Forum" section. Firstly, we aimed to maintain as wall-paper magazine but again we do not receive enough response and co-operation from our fellow students, so we had to give up our idea. In these circumstances we leave an appeal to our successors to attempt to run the section from next year.

We are glad to note that this year we have received a few valuable articles for publication in this issue of the Journal. We are deeply grateful to all who have taken trouble of contributing and sending valuable articles which have greatly enriched our Journal.

We have, to our great joy received the blessings and good wishes of President Dr. S. Radhakrishnan, Dr. Zakir Hussain, the Vice-President; the Attorney-General of U. S. A., Mr. Robert Kennedy; Mr. Justice Kotaro Tanaka of Japan; Mr. Justice Raghubar Dayal of the Supreme Court of India; Shri M. C. Setalvad, Ex-Attorney General of India, Shri C. K. Daphatary, the Attorney General of India. Shri S. P. Singh, Judge Patna High Court, Shri H. Mahapatra Judge Patna High Court, Shri K. L. Misra, Advocate General U. P., Shri S. M. Bose, Advocate General, West Bengal, Shri I. D.

UNIVERSITY COLLEGE OF LAW ATHLETIC CLUB

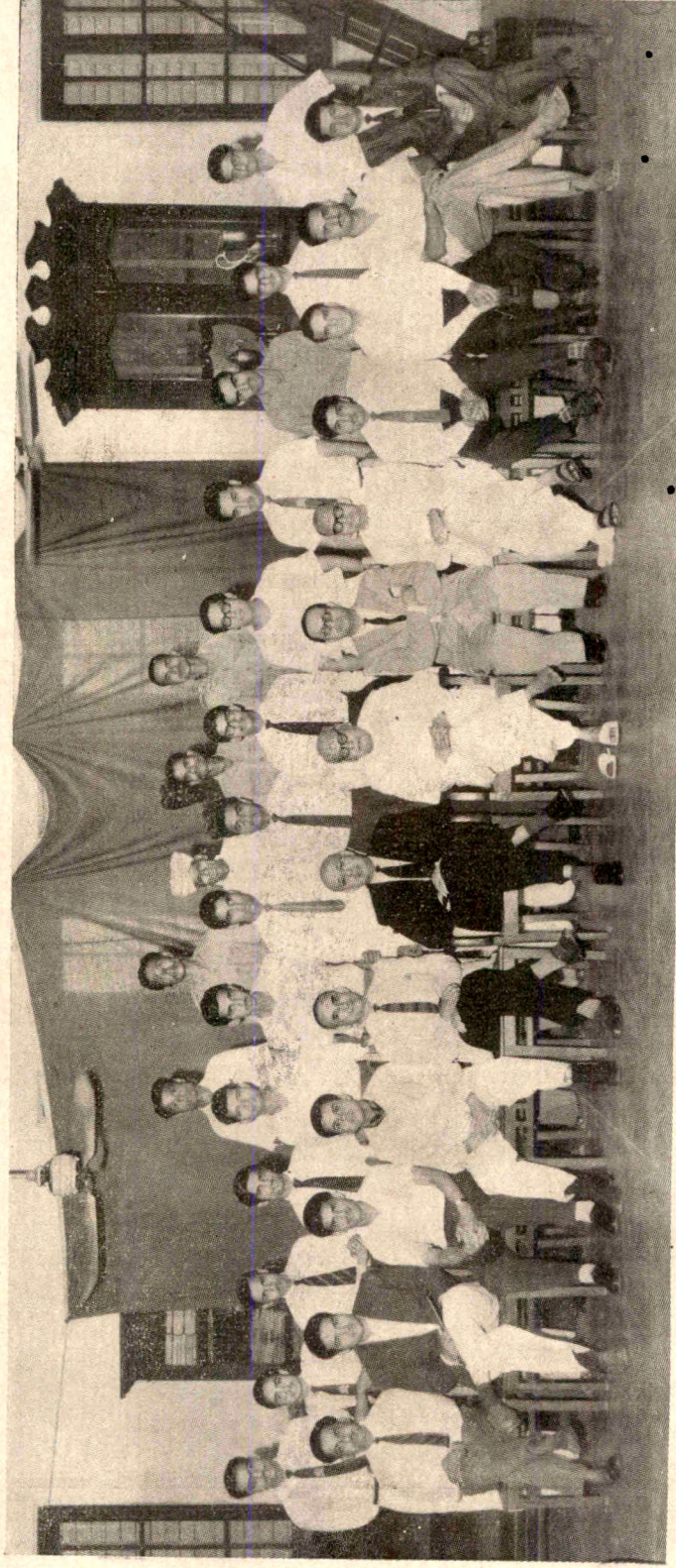
EXECUTIVE COMMITTEE SESSION 1962-63



Sitting—(L to R) Ramen Mukherjee (*Jt. Secy*) Dhrubendra Nath Bnerjee (*Jt. Secy*). Dr. B. N. Mukherjee (*Vice-Principal*), Sri. B. B. Malik (*Vice-Chancellor*) Dr. P. N. Banerjee (*Principal*), Prof. S. K. Mitra (*President*), Sri, M. P. Basu (*Superintendent*).
 Standing—(L to R), D. Mukherjee, Mani Bhattacharjee, Jitan Banerjee, G. Ghose, Nayan Chand Ghose, Badal Choudhury, Ganori (*Bearer*).

UNIVERSITY COLLEGE OF LAW ATHLETIC CLUB

MEMBERS OF THE CENTRAL COUNCIL-1962-63



Sitting (L to R)—B. Agarwal, N. Ghose, H. Paramanik, (Secy. Indoor games), D. Banerjee, (Jr. Secy.) Dr. B. N. Mukherjee (Vice-Principal), Sri B. B. Mallik (Vice-Chancellor), Dr. P. N. Banerjee (Principal), Prof. S. K. Mitra (President), Sri M. P. Basu (Supdt.) R. N. Mukherjee (Jr. Secy.), D. Mukherjee (Football Captain), D. Banerjee, B. Chowdhury.

Standing (L to R)—Members of the Central Council of the Athletic Club.

Report of the Hardinge Hostel

Our hostel even today stands in its towering majesty sheltering like a loving mother the students who have come from far and near in pursuit of learning. Indeed, any attempt of depicting a timely and satisfactory picture of the University College of Law which does not portray the Hardinge Hostel is, we think, found to be incomplete as any description of the ocean minus the waves and storms. The very keynote of success of any educational institution depends on the extent to which it can foster a sense of familiarity between the students and the institution as such. And to this direction our Hostel can legitimately be proud of its unique role in the day to day life of Law College. The Law College Union and Athletic Club from their very inception, have been enriched by this Hostel by a steady flow of active participants who have contributed towards the building up of a healthy students' Union. What is more, the role of the Harding Hostel even in the active life of the Post-graduate departments of the Calcutta University is not in the least unimpressive.

Under the fatherly care of our illustrious Principal Dr. P. N. Banerjee, the boarders of the hostel are living literally in a kingdom of bliss and happiness. We are proud to mention here that our boarders have always been taking leading parts and lively interests in different aspects of the cultural activities as well as the sports. Several portfolios of the College Union are held by our boarders. Sri Shyamal Kumar Chatterjee is the General Secretary of the College Union. Sri Subodh Kumar Hazra is the Assistant General Secretary as well as

one of the Jt. Secretaries of the Student's Aid fund department. Sri Srikanta Mukherjee occupies the proud position of editorship of the "Law Journal". One of the Jt. Secretaries of the Debate Department is Sri Samirgati Roy and Sri Basudev Kundu is one of the Jt. Secretaries of the Social and Drama department.

One of the Jt. Secretaries of the College Athletic Club is Sri Ramen Mukherjee. Sri Hirak Pramanik is the Indoor-Games Secretary, whereas Sri Nikhil Chakrabarty is the Badminton Captain of the College.

This year, the achievements of our boarders in various spheres are admirable. It is gratifying to note that all students who have appeared in the last M. A., M. Com. have come out successful. We are proud to mention that Sri Kalyan Majumdar has secured a first class in the Final LL. B. examination. Sri Prabhakar Jha has stood first in the Calcutta University M.A. examination in French. Sri Mani Bhatteerjee and Sri Benoy Chakravarty have passed the Final C. A. examination. The achievements of these boarders have greatly enhanced the prestige of our Hostel.

When all is said, still we who are the students of law and are entrusted with the task of holding the truth and justice high, should be failing in our duties if we fail to give the otherside of the picture. It is indeed a tragedy that inspite of all the efforts of our esteemed Principal, a number of long-standing grievances have accumulated which are crying for immediate solution. There is little justification

in changing Rs 20/- (five rupees more than the usual charges) during summer vacation when the students have to stay in the hostel to prepare for the examination. The dining hall needs betterment to ensure healthy and clear atmosphere. One telephone should preferably be installed in the common room for the use of the students. The narrow visitors' room having failed to satisfy the needs of the majority of the students, cries for immediate improvements. And finally, the top-floor which contains the biggest number of students should be installed with two more water taps. We register all these grievances with a spirit of co-operation and mutual understanding and therefore hope that the authorities would take every possible care to understand the genuineness of the problem and solve them gradually if not all at a time.

We record with deep reverence our appreciation of the fostering care of our Principal Dr. P. N. Banerjee and Vice-Principal Dr. B. N. Mukherjee and the able guidance of our beloved Superintendent Professor Sadhan Ray Chaudhury and Deputy Superintendent Sri Mrityunjoy Basu.

Dindayal Singh

Chairman,

Standing Committee Ward V

Mani Bhattacharya

Chairman,

Standing Committee Ward IV

Manomay Nanda

Chairman,

Standing Committee Ward III

Jalan, Law Minister West Bengal, Mr. O. H. Mutham, Ex-Chief Justice of Allahabad High Court, Mr. Milton Kaplon, Administrative officer, Ford Foundation, Shri G. D. Parikh, Rector, University of Bombay, Shri N. H. Bhagwati, Vice-Chancellor, Banaras Hindu University and Mr. Frank Anthony are amongst many others.

We are deeply grateful to our Principal, Dr. P. N. Banerjee, without whose valuable advice and guidance our Journal would not have been so successful as it has been. We also convey our gratitude to our Vice-Principal Dr. B. N. Mukerjee, Our President, Prof. S. A. Masud, Our Treasurer and Vice-President Prof. S. K. Mitra and Vice-President, Shri Netai Das Roy, Prof. Nakuleswar Banerjee; and Shri Mrityunjay Prasad Basu, our affectionate and respected Superintendent for their valuable suggestions and cooperations.

We express our thanks and gratitudes to those who have enriched this journal by their co-operations and to students in general for their valuable collaborations and sympathy. We very gratefully mention the names of Sarbashree Manish Basu Roychowdhury (our beloved 'Barda'), Banshi Mohan Ta, Sundar Gopal Mondal, Ramen Mukherjee, Prasanta Das, Kamal Kishore Khettri, Avijit Acharya, Hanuman Prasad Modi, Dindayal Singh Ram Raj Roy S. Kothari, Dhiren Ghosh, Bajlar Rahaman Shri Sribhusan Mitra Sri S. K. Seal and Sri H. C. Sarkar of M/s. Pressagents (P.) Ltd. who have by their untiring zeal of work made the editors' work very easy and pleasant.

To all others, our thanks and gratitude.

SRIKANTA MUKHERJEE

PARAS NATH SINGH

Report by Jt. Debate Secretary

Our College holds an undisputed leadership in the field of Debate. This year too we have spared no pains to uphold the dignity and tradition of our college. Our college can well boast of a galaxy of talented debators whose sincere endeavour once again paved the way of our all round success.

Due to the National Emergency we had to curtail our Budget which affected our programme too. We participated in a few debate competitions and of course not without success. It is heartening to mention that we triumphed all the All-India Debate competitions we participated.

First victory in series was All-India Inter-college Debate Competition, organised by Medical College, Calcutta. Our college was represented by V. S. K. Rao and Subal Maitra. Subal Maitra was awarded a certificate of merit, he also stood first in the Moot Court competition previous year. Our College represented by V. S. K. Rao and Viswanath More won the Dr. Seve Memorial All-India Inter-college Debate Competition, held under the auspices of National Medical College, Calcutta. The same team kept up the tradition of our college by retaining the trophy in 'All-India Inter' varsity Debate Competition, organised by Lucknow University Law College at Lucknow and added new feather to its cap while they triumphed in the Dag Hammarskjold International Debate Competition, held under the patronage of Punjab University Law College at Chandigarh. Moreover, V. S. K. Rao was awarded the first prize for the best individual performance at Lucknow and was placed in the third position at Chandigarh. The other participant Viswanath More was highly appreciated for

his scholarly performance in both the places. Our team represented by Pronab Mukherjee and Badal Chatterjee won the runner's-up in the Debate Competition held under the auspices of Hooghly Mahusin College, Hooghly, and Pronab Mukherjee was awarded the second prize for the best individual performance. The other budding debators of our College are Pradip Ghose, O. P. Shah, Swapan Nag, Amal Dutta, Ranu Guha and J. K. Somani. Pradip Ghosh was selected to represent Calcutta University in the Youth Festival (1962) in Delhi. However it was called off due to the National Emergency,

The greatest achievement of ours is the revival of "All-India Inter 'varsity Asutosh Memorial Debate Competition" (1963) after a lapse of 16 years. This historic trophy, inaugurated in 1938, was abandoned in 1946. We had the honour of inviting Sri A. K. Sen, Union Law Minister, to inaugurate the debate while Mr. Justice Deep Narayan Sinha of Calcutta High Court acted as the Chairman of the board of judges other judges being Professor N. Viswanathan of St. Xavier's College, Calcutta, and Professor S. A. Masud, President of our Union. Presidency College, Calcutta, won the trophy.

Our report would be incomplete if we fail to mention the results of the other competitions, organised by us. The results may be summed up as follows :—

(1) Moot Court Competition :
(for First year students only)

First—Mridula Sicka.

Second—Bisok Guha Mazumdar.

Third—Himanshu Shekhar Josh.

(For second and Third year students).

First—Asoke Tebrewal (3rd year).

Second—Probir Chatterjee (3rd year).

Third—Samir Sengupta (2nd year).

Fourth—S. C. Sukhāni (2nd year).

Special prize—A. Srinivasan (2nd year).

(2) The Annual Debate Competition (1963)

1st prize—Amal Dutta 1st year).

2nd prize—Ranu Guha (1st year).

3rd prize—J. K. Somani (3rd year).

While concluding, we must express our heartfelt thanks to our beloved professors, our colleagues and our debators without whose earnest co-operation our efforts would not have been translated into such a success.

With a note of encouragement to our successors and assuring them our humble co-operation, we retire.

SAMIR GATI RAY

BHAIRAB GHATAK

(Jt. Secy. Debate)

Sub-Committee

Sri Udit Chaki.

Sri Prabhas Das.

Sri Anjan Chatterjee.

Cultural & Legal Conference

This year Legal Conference could not be held. Owing to the national emergency, however, in collaboration with the Drama and Social Department, the birth centenary of Swami Vivekananda was celebrated in a befitting manner. Drama, "Veer—Sannyasi" based on the life and ideals of Swami Vivekananda was successfully staged on 5th April, 1963 by the students of our College.

It was inaugurated by Sri Sankardas Banerjee, Finance Minister, Government of West Bengal.

A symposium on "Vivekananda and National Integration" was organised on the 6th April, 1963 in the Law Library Hall. Sri P. C. Sen, Chief Minister, Government of West Bengal inaugurated the symposium, Dr. B. B. Malik, Vice-Chancellor and Swami Sambuddananda, Secretary, Swami Vivekananda Centenary Celebration Committee participated in the symposium. After the symposium there was a musical performance on the day. Many reputed artists took part in the soiree.

Our best wishes to you all.

ANUP DEB

ASHIS SENGUPTA

(Jt. Secy. Cultural & Legal Conference)

Report from the Aid Fund Department

(1) Education in our country is handicapped at all levels by financial stringency for the students in general. Any sort of economic aid therefore goes a long way towards removing this obstacle. We are proud to mention that the task of giving such aid, with which the Aid Fund department is entrusted, could be done this session with more than moderate achievements.

A large number of applications for the grant of lump sum aid was received this year. Every one of them was examined against the criterion of meritcum-poverty. However, in the final analysis, most of the applicants (222) became recipients (170). In this respect, the President of the Union Prof. S. A. Masud's guidance was of immense relief.

(2) A novel feature of this year's activities has been the creation of a fund of Rs 800/- for giving special help to the meritorious students

of this college who show merit in the annual examinations. Actually this was created drawing upon the balance set aside for the purpose last year.

(3) The second most important task of this section concerns the students' Aid Fund Library. Distinguished from the College Library and dealing mostly with text and sub-text books, this rather library is perhaps of most beneficial use to the students, specially to the needy and before the examinations. The scanty stock of books prevents liberal use. To compensate, we tried to enforce quicker returns. About 100 books were purchased this year, but more is needed.

(4) Running of the Cheap Store also comes under this department. The said store actually functioned very successfully for the benefit of the students so that a record sale of Law books, exercise books of various sizes, inks, pens and papers was made.

(5) Printing of the past question papers in booklet form is another important task with which this department is entrusted. However our General Secretary Sri Syamal Chatterjee was prompt enough to print them initially before the Working Committee started working, so that the students could get the papers before the examinations. We thank him for his sense of responsibility,

(6) In fine, we must acknowledge our deep sense of gratitude to Prof. S. A. Masud, President and to the three Vice-Presidents of the Union for their valuable guidance, and to Sri Benoy Chatterjee, Sri Bijan Chakravorty and Sri Amit Roy for their able assistance, and the members of the Sub-committee for their active co-operation.

SUBODH HAZRA

SHANKAR ROY

Jt. Secretaries.

Sub-Committee :

Sri Manish Kar Bhowmik.
 Sri Anup Deb (Retired).
 Sri Satyen Chakravorty.
 Sri Nanda Ghosh.

Report of the Social and Drama Secretaries

Before we put forward the balance sheet of our activities, we pay our humble homage to our great Jwans whose sacred blood has reddened the Himalayan front. National Emergency collod upon us to postpone our all entertainment programmes and thus we won't wish to recapitulate the musical loud of our Freshors' welcome, inaugurated by Mr. K. C. Basu, speaker, West Bengal Assembly. It is a pleasure on our part that we annexed the title in Inter-College One-act Drama Competition in Hindi group while our perforamee in Bengali and English group once again received the warm appereciation Judges. We celebrated the Vivekananda Centenary with the cooperation of other folio on the 5th and 6th April Veer-

Sanyasi was staged by our students on the 5th April and was inaugurated by Sri Sankar Banerjee, the Finance Minnister, West Bengal. On the 6th April we had the honour of inviting our Chief Minister Sri P. C. Sen at a Syphosium on "Vivekananda and National intregrety". we are also proud to note that Sri Sen was the First Chief minister to address the students of our College. Symphosium included the renowned speakers like Mr. Justice P. B. Mukherjee and Swami Sambhudananda Maharaj.

We like to convey our gratitude our revered Vice-chancellor Sri B. B. Malik, our Principal Dr. P. N. Banerjee, President, Vice President and Superintendent. While concluding we extend our heartfull thanks to Shyamal Chatterjee, Pranab Mukherjee, Samir Gati Ray, Ranen Dutta, Anjan Chatterjee, Mani Bhattacharjee, Diren Ghosh, Broj Kisore Roy (Lalu) and Ranjit De.

Asutosh Law.

Basudev Kundu.

Badal Chatterjee.

Jt. Secretaries Social & Drama.

Social Sub-Committee :

- (1) Samaresh Mukherjee.
- (2) Vijoy Narayan Singh.
- (3) Sujit Sarkar.
- (4) Bazlau Rahaman.



Around the Ground

Athletic Secretaries' Report

The *Athletic Season* commenced with *football* under the Captaincy of Sri Dipak Mukkerjee. Our club did not achieve much success in the Inter-collegiate Soccer Tournaments, yet a member of our college team, Sri S. Mitra, represented the Calcutta University Football Team this year which took part in the All-India Inter-Varsity Football Tournament.

Though our College *Cricket* team gave a creditable performance in the Inter-collegiate level, we were unfortunate in losing in the quarter-final of the League tournament. The fact that Sri M. Parekh, Captain of the College team played outstandingly well in the Inter-University Cricket Tournament for Calcutta this year, adds much to the proud heritage of our college.

The performance of the *Rowing* team in the Inter-collegiate Regatta Tournament deserves special mention. Our Rowing team under the skipper's ship of S. Dalal annexed the League Championship for the second year in succession. Our thanks to Sri G. Gopalan, J. Chaudhuri and A. Kundu for their magnificent performance,

This year the *Annual Athletic Sports* of the College was held on a reduced scale due to the situation of emergency prevailing in the country. M. Justice Paresh Nath Mookerjee presided over the function before a large gathering of students, guests and friends. We thank one and all who helped us in making the

function an unprecedented success.

The College participated in the Inter-collegiate *Basket-ball* and *Volley-ball* championships and reached the semi-finals. Our thanks to Sri N. C. John, Captain of the teams for the teams for his active co-operation.

The Indoor Games competitions of the College in *Table Tennis* and *Carrom* was held with great enthusiasm. Our congratulations to Sri P. Das for winning the Men's Singles title and the Doubles title with his partner H. Paramanick. The Carrom competition was won by T. S. Rajan who also won for the college the Inter-collegiate Carrom championship. Our congratulations to him. Much credit goes to Sri H. Paramanick, Indoor Games Secretary, for organising this department. Our thanks to Boarders of Hardinge Hostel for their kind co-operation in conducting the Indoor Games Tournament and the Superintendent Professor S. Roy Chowdhury for the permission to use the Badminton court and table Tennis board.

The Body-building competition of the College *Gymnasium* was held with success this year. The results of the four events held are as follows ;

Mr. Law College—Sri Asoke Banerjee.

Mr. Samson—Sri A. Chakravarti.

Endurance Test—Sri A. Chakravarti.

Yogic Asanas—Sri Bhabani Dasgupta.

Our Physical Instructor, Sri Monotosh Roy, Mr. Universe, conducted the competitions and served as our inspiration and guide.

The College Hockey team, so far, has put up an outstanding performance under the captaincy of Sri Gopi Ghosh. We were unfortunate to lose in the championship play off due to injuries and unavailability of the players, but the team is confident of retaining the Inter-collegiate Knockout Trophy which we won last year. Special mention must be made of Sri D. Ghosh who had the privilege of representing Bengal with distinction in the National Hockey Championship and has also been selected to captain the Calcutta University Hockey team this year. Our congratulations to Sri G. Ghosh and J. Deb who have justified their inclusion the University Hockey team.

Our flaws and mistakes are there and we hope that the members succeeding us will make improvements on whatever we leave them with and attain greater success in future. We feel indebted to our beloved Principal, Dr. P. N. Banerjee, for his untiring efforts to infuse and

foster a spirit of sports and games amongst the students. We thank also Dr. B. N. Mukherjee and Professor Sunil kumar Mitra, our popular President of the Athletic Club, for their kind guidance in every brance of sports and games. Our thanks to Sri Mrityunjoy Prasad Basu, Superintendent of the College, for his valuable advice and active co-operation. We cannot end our report without extending our hearty and sincere thanks to all the members of the Law College Athletic Club, the Executive Committee members and to our student friends without whose active help it would not have been possible to undertake the task entrusted to us.

DHRUBEN BANERJEE

RAMEN MUKHERJEE

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„	Snuilkanti Pal	1958-1959— „	Sunil Kanti Banik
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21. Ramgopal Saraogi
22. Rammohan Roy
23. Ramjas Agarwala
24. Dibakar Nag.
25. Md. Anwarali
26. Ranendranarayan Ray

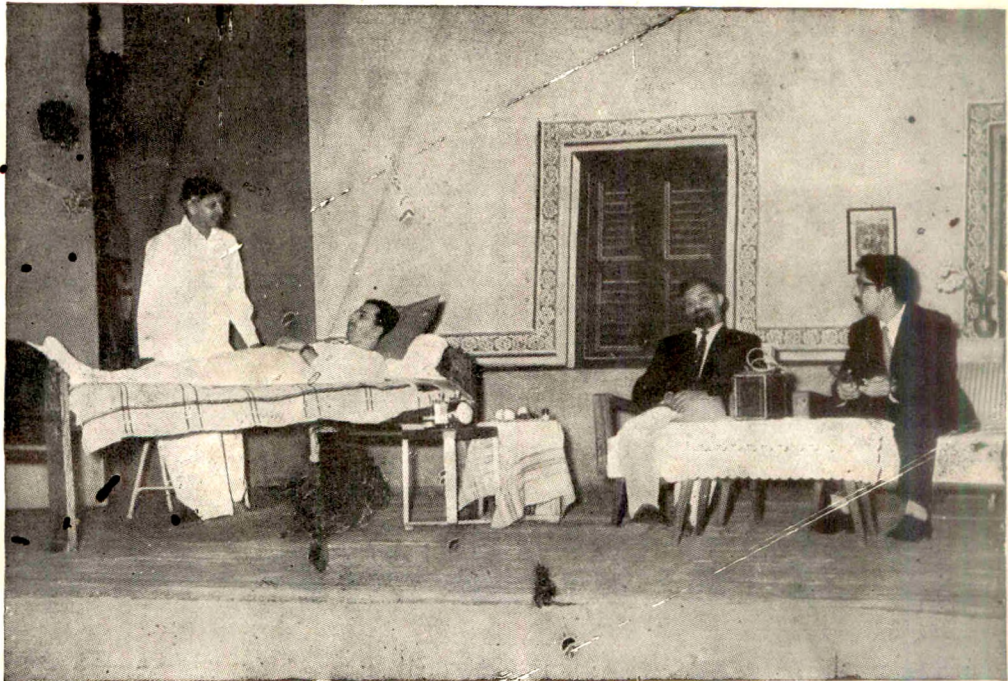
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27. Shyamal Kumar Chatterjee
28. Srikanta Kumar Mukherjee
29. Pranabkumar Mukherjee
30. Paras Nath Singh
31. Subodhkumar Hazra
32. Basudeb Kundu
33. Bhairabnath Ghatak
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36. Dindayal Singh
37. Harasitkumar Ghosh
38. Ranjitkumar Dey
39. Arabinda Ghosh
40. Samirendranath Dasgupta
41. Asokekumar Ray
42. Suhridranjan Basu Mallik
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44. Raneskumar Majumdar
45. Bijankumar Chatterjee
46. Sibaprasad Mukherjee
47. Prabirkumar Chatterjee
48. Amalkanti Banik
49. Paritosh Banik
50. Austinvictor Machado
51. Surinderkumar Bajaj
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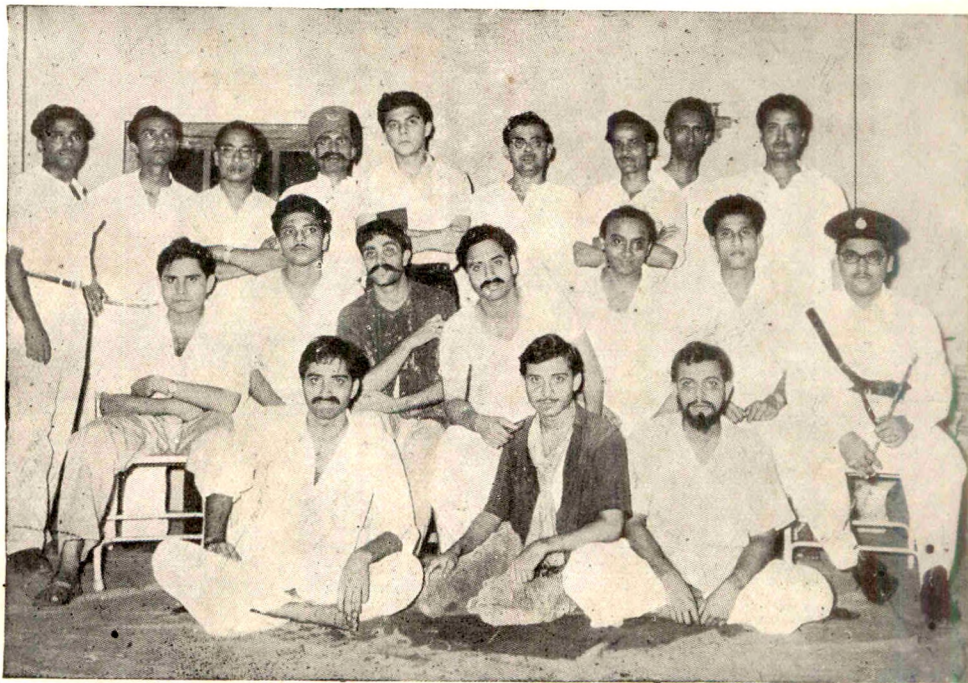
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81. Sk. Maqubul Haque	112. Biswajit Bose

THE PARTICIPANTS OF THE HINDHI DRAMA



A scene from *Roop Ki Bimari*,
(L to R) S. P. Gupta, S. Singh, Mishra, R. Melhotra

THE PARTICIPANTS OF THE ANNUAL BENGALI DRAMA



Sitting on floor (L to R)—Santi Ganguli, Chitto-Mukherjee Udit Chaki
Sitting (L to R)—Nandadulal Ghose, Dilip, Sitaram Behani, Basudev Kundu,
 Sankar Ray, Badal Chatterjee, Brajoray
Standing (L to R)—Hari Ranjan Ghose, A. Shome, P. N. Singh, Baidyanath Sarkar,
 Ashu Law, Shyamal Chatterjee (G S.) Samareesh Chatterjee, Satyen
 Chakerborty, Dhiren Ghose



HARDINGE HOSTEL